TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 81

THE ALTON RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED MAY 10, 1933

(36,770)

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

THE ALTON RAILROAD COMPANY, a Corporation, Petitioner,

vs.

THE UNITED STATES OF AMERICA et al., Defendants

PETITION—Filed Jan. 16, 1932

To the Honorable Judges of the District Court for the Northern District of Illinois, Eastern Division:

Your petitioner, The Alton Railroad Company, a corporation, brings this action against defendants, The United States of America (hereinafter called the "United States") and Interstate Commerce Commission (hereinafter called the "Commission") for the purpose of enjoining, setting aside, anulling and suspending part of a certain order of said Commission and against defendants The Baltimore and Ohio Railroad Company, Boston and Maine Railroad, The New York Central Railroad Company, lessee of Boston and Albany Railroad, Buffalo, Rochester and Pittsburgh Railway Company, The Central Railroad Company of New Jer- [fol. 3-2] sey, Central Vermont Railway, Incorporated, The Chesapeake and Ohio Railway Company, Chicago and Erie Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The Delaware and Hudson Company, The Delaware, Lackawanna and Western Railroad Company, Erie Railroad Company, Grand Trunk Western Railway Company, Lehigh and New England Railroad Company, Lehigh Valley Railroad Company, Maine Central Railroad Company, The New York Central Railroad Company, lessee of Michigan Central Railroad, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, The New York, New Haven and Hartford Railroad Company, New York, Ontario and Western Railway Company, New York, Susque-

hanna and Western Railroad Company, The New Jersey and New York Railroad Company, Norfolk and Western Railway Company, The Pennsylvania Railroad Company, Pere Marquette Railway Company, Reading Company, Rutland Railroad Company, Walter S. Franklin and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, and Western Maryland Railway Company (hereinafter collectively called the "Railroad Defendants"), for the purpose of enjoining said Railroad Defendants from applying and enforcing against petitioner certain divisions of joint rates approved, authorized and required by said Commission in said order.

Petitioner respectfully sets forth and alleges the following facts as constituting its cause of action:

(1) Petitioner is a corporation duly organized and existing under the laws of the State of Illinois and is a common carrier by railroad subject to the Interstate Commerce Act and operates lines of railroad in the Northern District of Illinois, Eastern Division, and elsewhere, including a line from Peoria and Pekin, Illinois, to Dwight, Joilet and Chicago, Illinois. Its principal office and principal operating office is located in the City of Chicago, in said Northern Dis- [fol. 3-3] trict of Illinois, Eastern Division. It was the purchaser, at foreclosure sale, of all the railways and properties of The Chicago and Alton Railroad Company, a corporation (hereinafter called the "Railroad Company"), which were operated from August 30, 1922, until July 18, 1931, by William W. Wheelock and William G. Bierd (hereinafter called the "Receivers"), as Receivers thereof. Under a final decree of foreclosure and sale, dated July 6, 1929, a decree confirming sale and approving deed, dated January 8, 1931, and an order discharging Receivers, dated November 9, 1931, all of said orders being entered in the case of The Texas Company, et al., complainants, v. The Chicago and Alton Railroad Company, et al., defendants, Consolidated Cause No. 2940, pending in the District Court of the United States for the Northern District of Illinois, Eastern Division, petitioner acquired all the right, title and interest of the Railroad Company and the Receivers, in and to the railways and property of the Railroad Company, and succeeded to all their rights, duties and obligations with respect to the subject matter of this suit. The defendant,

United States, is sued pursuant to express authority of the Congress of the United States, as provided in an Act approved October 22, 1913, known as the "Urgent Deficiency Appropriations Act", (38 Stat. L. 219; Chap. 32, Title 28, Sections 43 to 48, United States Code 1926). The Commission is a commission existing under and by virtue of the Interstate Commerce Act and is specifically charged with the administration and enforcement of the provisions of said Act. The Railroad Defendants are all duly organized corporations and/or common carriers by railroad subject to the Interstate Commerce Act, and operate lines of railroad eastwardly from Dwight, Joilet and Chicago, Illinois, to points in the states of New York, Pennsylvania and other states east of Buffalo, New York. The order of the Commission complained of relates to transportation and to a matter complained of in a petition filed with the Commis-[fol. 3-4] sion by the Receivers, and designated on the docket of the Commission as "No. 22487, William W. Wheelock and William G. Bierd, as Receivers of Railways and Property of The Chicago & Alton Railroad Company v. Akron, Canton & Youngstown Railway Company, et al."

(2) For many years there has been and there is now a large movement of grain, grain products and grain by-products in carload lots to Peoria and Pekin, Illinois, from states north and west thereof, which traffic has been and is now hauled into Peoria and Pekin by the railroads serving said points from the west and north and there delivered. Under tariffs on file with the Commission, such grain or the products or by-products thereof may be reshipped from Peoria and/or Pekin to destinations east of Buffalo, New York. If so reshipped within twelve months after the commodities have been delivered at Peoria or Pekin, the traffic is known as transit traffic, and the transportation service thereon from Peoria and Pekin to the eastern destinations is performed by the railroads upon the payment of what are known as reshipping or proportional rates. Such reshipping rates are joint through rates filed with the Commission pursuant to law by the railroads performing the transportation service thereunder from Peoria and/or Pekin to the eastern destinations. If such grain or the products or by-products thereof is not reshipped from Peoria or Pekin within twelve months after the commodities are delivered

there, the traffic is known as non-transit traffic and may only be reshipped to destinations east of Buffalo, New York, upon payment of what are known as local rates. Such local rates are also joint through rates filed with the Commission pursuant to law by the railroads performing the transportation service thereunder from Peoria and/or Pekin to the eastern destinations. Such local rates are greater in amount than the reshipping rates, although both rates are joint through rates and are collected for the same transportation service on the same commodities.

(3) The Railroad Company, the Receivers, the Railroad [fol. 3-5] Defendants herein and/or petitioner have been for many years and are now engaged in the transportation of the transit and non-transit traffic herein described, from Peoria and/or Pekin to destinations east of Buffalo, and have been and are now parties to the joint local or reshipping rates applicable thereto. On such traffic, the service formerly performed by the Railroad Company or the Receivers, and now performed by petitioner, consists of receiving the traffic at Peoria and/or Pekin, hauling it to Dwight, Joilet or Chicago, Illinois, and there delivering it to one or more of the Railroad Defendants herein for further transportation.

(4) Prior to July 18, 1931, the Railroad Company, and/or the Receivers and the Railroad Defendants herein, by joint action, published and filed with the Commission the joint through rates applicable to the transportation of the transit and non-transit traffic herein described, from Peoria and/or Pekin to destinations east of Buffalo. Since July 18, 1931, said joint through rates have been so published and filed by joint action of petitioner and the Railroad Defendants herein, pursuant to the requirements of Paragraph 4, Section 6 of the Act to Regulate Commerce.

(5) Prior to July 1, 1928, the Railroad Company and/or the Receivers, for the service performed by them in the transportation of said transit and non-transit traffic from Peoria and/or Pekin to destinations east of Buffalo, received certain divisions of the joint through rates applicable to said transportation, which divisions were in effect on February 29, 1920, and which constituted the entire compensation received by the Railroad Company

and/or the Receivers for the service performed by them in the transportation of said traffic. Effective July 1, 1928 and February 1, 1929, the Railroad Defendants herein, without the consent of the Receivers and over their objection and without any order or finding of any court or commission having jurisdiction, arbitrarily reduced the divisions theretofore allowed to the Railroad Company [fol. 3-6] and/or the Receivers out of said joint rates for the service performed by them in the transportation of said transit and non-transit traffic from Peoria and/or Pekin to destinations east of Buffalo, said divisions being reduced to nothing on many shipments and to a maximum of 2 cents per hundred pounds on the rest of said traffic. The Railroad Defendants herein were able to enforce said reduced divisions, since they collected the freight charges on the shipments and distributed those charges among the railroads performing the transportation service, and since July 1, 1928, have enforced them, over the protest of the Receivers and petitioner.

(6) Thereafter, on June 21, 1929, the Receivers filed with the Commission a complaint, alleging that the said divisions accorded to them out of the joint through rates applicable to the movement of the said transit and non-transit traffic from Peoria and/or Pekin to said eastern destinations, subsequent to July 1, 1928 and February 1, 1929, had been in the past, were then, and would be for the future, unjust, unreasonable and inequitable and were unduly preferential of the defendants named in said complaint and unduly prejudicial to said Receivers, in violation of Paragraph (4) of Section 1 of the Interstate Commerce Act; and that said divisions of said joint rates had been and were then unlawful and in violation of Section 208 (b) of the Transportation Act, 1920, in that they constituted a change in the division of joint rates and charges in effect on February 29, 1920, and had been made effective by said defendants without the agreement of said Receivers and over their protest and without the approval of any court or commisison having jurisdiction. In said complaint, all the Railroad Defendants herein were named as defendants, together with certain other railroads which participated in the transportation. Said complaint was received and filed by the Commission and designated on its docket as "No.

22487, W. W. Wheelock, et al., Receivers, etc. v. Akron, Canton & Youngstown Railway Company, et al." A copy [fol. 3-7] of said complaint is attached hereto and made a part of this petition, marked "Appendix A".

(7) Thereafter, upon due notice, a hearing was had before the Commission in said case, evidence was introduced by said Receivers and the defendants therein, briefs were filed with the Commission and the cause submitted to it for its decision. On November 28, 1930, Division 5 of said Commission made its report and order in said cause, a majority of said Division 5 finding that the divisions theretofore allowed to said Receivers out of said joint rates on said transit and non-transit traffic were unjust, unreasonable and inequitable, and prescribing the divisions to be received in the future by the Receivers out of said joint rates. A copy of said report, dissenting opinion and order of the Commission is attached hereto and made a part of this petition, marked "Appendix B".

(8) Thereafter, the Commission, upon a petition filed by the defendants in the case before it, entered an order indefinitely postponing the operation of its order theretofore made in said case (part of Appendix "B"), and reopening said case. Thereafter said case was set down for further hearing upon which hearing the parties to the case offered additional evidence, thereafter filing further briefs and again submitting said case to the Commission for decision. On December 7, 1931 the full Commission issued its report and order on the rehearing in said case, in which a majority of the Commission affirmed the previous decision of Division 5 (Appendix "B") with respect to the divisions accorded the Receivers out of the joint local rates applying on the movement of non-transit grain, grain products and grain by-products from Peoria and/or Pekin to destinations east of Buffalo, and required that the divisions found proper on such traffic be established on or before January 16, 1932. With respect to the divisions accorded the Receivers out of the joint reshipping rates applying on the movement of transit grain, grain products and grain by-products, from Peoria and/or Pekin to destinations east [fol. 3-8] of Buffalo, the report and order of the Commission, made December 7, 1931, reversed the previous decision of Division 5 (Appendix "B") and found and held

that the present divisions accorded the Receivers out of such rates were not unjust, unreasonable or otherwise unlawful, and approved, authorized and required them for future application and enforcement by the Railroad Defendants herein. A copy of said report, dissenting opinions and order of December 7, 1931, is attached hereto and made a part of this petition, marked Appendix "C".

(9) The said joint reshipping or proportional rates referred to in the reports and orders of the Commission, attached hereto as Appendices "B" and "C", and applying upon the movement of transit grain, grain products and grain by-products from Peoria and/or Pekin, Illinois, through Dwight, Joliet and Chicago to destinations east of Buffalo, are now on file with the Commission, pursuant to law, and are in full force and effect. Petitioner is required by law to perform and is performing a transportation service thereunder, said service consisting of hauling shipments of grain, grain products and grain by-products from Peoria and/or Pekin to Dwight, Joliet and/or Chicago and there delivering said shipments to one or more of the Railroad Defendants herein for further transportation. For such transportation service, the Railroad Defendants herein are now allowing to petitioner and petitioner is receiving, all under authority and by virtue of the Commission's report and order of December 7, 1931 (Appendix "C"), those reduced divisions made effective by the Railroad Defendants herein on July 1, 1928, and February 1, 1929, and approved and authorized by the Commission in said report and order. Said divisions constitute the only compensation now received by petitioner for said service. Under them, petitioner receives nothing on many shipments and on many others a maximum of 2 cents per hundred pounds, which does not pay the cost incurred by petitioner in performing the service.

[fol. 3-9] (10) Petitioner alleges that the effect of said report and order of the Commission, dated December 7, 1931 (Appendix "C"), is to authorize and require the application of the divisions of said joint reshipping rates approved by the Commission in said report and order, and require petitioner to engage in the transportation of said transit traffic under said joint reshipping rates from Peoria and/or Pekin to destinations east of Buffalo, New York, upon the

payment to petitioner by the Railroad Defendants herein of said divisions, which are insufficient to pay the actual cost incurred by petitioner in performing its part of the through transportation; that there is no evidence in the record of the proceedings before the Commission which justifies said requirements and that said order is, therefore, unreasonable, arbitrary, unlawful and void and if permitted to remain in effect will operate to confiscate the property of petitioner and deprive it of its property without due process of law and without compensation, in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

(11) Petitioner alleges that in the report and order of the Commission, dated December 7, 1931, it is inferred that petitioner may avoid the confiscation of its property, as alleged herein, by withdrawing from the transportation of the said transit traffic under said joint reshipping rates from Peoria and/or Pekin to destinations east of Buffalo and by canceling its concurrence in said joint reshipping rates, and further alleges that the Commission approved and authorized the present divisions allowed by the Railroad Defendants herein to petitioner out of said joint reshipping rates, in order to force petitioner to withdraw from said traffic and cancel its concurrence in said rates. Petitioner further alleges that the propriety of the continued publication and application by petitioner and the Railroad Defendants herein of said joint reshipping rates and the continued participation of petitioner in the transportation of said traffic under said rates were not issues in [fol. 3-10] the proceeding before the Commission, and that the Commission in authorizing and requiring the present divisions allowed to petitioner out of said rates by the Railroad Defendants herein, for the purpose of forcing petitioner to discontinue its participation in said rates and transportation, passed upon an issue not presented to it for determination and with respect to which there was no evidence in the record of the proceedings before it, and that, therefore, the action of the Commission in approving and authorizing the divisions theretofore allowed to petitioner by the Railroad Defendants herein, for the service performed by petitioner in the transportation of said traf-

fic under said joint reshipping rates was unreasonable, arbitrary, unlawful and void, and beyond the jurisdiction of the Commission.

(12) Paragraph (b) of Section 208 of the Transportation Act 1920, effective February 29, 1920, reads as follows:

"All divisions of joint rates, fares or charges, which on February 29, 1920 are in effect between the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by mutual agreement between the interested carriers, or by state or federal authorities, respectively."

Petitioner alleges that the divisions of said joint reshipping rates from Peoria and/or Pekin to destinations east of Buffalo, made effective by the Railroad Defendants herein on July 1, 1928 and February 1, 1929, and thereafter enforced against the Receivers and petitioner, constituted a change in the divisions of said joint reshipping rates effective on February 29, 1920, and were made effective by said Railroad Defendants herein without the agreement of the Railroad Company, the Receivers or petitioner and without the approval or authority of any state or federal court or commission having jurisdiction of the subject, and were therefore unlawful because made effective by said Railroad Defendants herein in violation of said Paragraph (b) of Section 208 of the Transportation Act, 1920. Petitioner further alleges that the divisions of said joint reshipping rates approved and authorized by the Commission in its said report and order of December 7, 1931 (Ap- [fol. 3-11] pendix "C") are the divisions so made effective and enforced upon petitioner by the Railroad Defendants herein in violation of law, and that the only present authority for the application of said divisions is the said report and order of the Commission. Petitioner further alleges that said divisions, so established by the Railroad Defendants herein contrary to law, and authorized and required by the Commission in its report and order of December 7, 1931, are now being enforced and applied by the Railroad Defendants herein against petitioner under the authority of the Commission's said report and order of December 7, 1931, and that the effect of the enforcement and application of said divisions is to confiscate the property of petitioner

and deprive it of its property without due process of law and without compensation, contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

(13) Petition- further alleges that unless it cancels its participation in said joint reshipping rates applying on said transit traffic from Peoria and/or Pekin to said eastern destinations and withdraws from participation in the transportation of said traffic, or unless given relief by this court, there is no way in which it can now avoid the application and enforcement against it by the Railroad Defendants herein of the confiscatory and unlawful divisions of said joint reshipping rates, unlawfully made effective by said Railroad Defendants on July 1, 1928, and February 1, 1929, and authorized and required by the Commission in its said report and order of December 7, 1931 (Appendix "C"); that it now has a lawful right to participate in said joint reshipping rates and in the transportation of transit traffic thereunder; that it is daily performing a transportation service between Peoria and/or Pekin and Dwight, Joliet and/or Chicago, upon said transit traffic moving under said joint reshipping rates; that in dividing the revenue accruing upon each shipment of said traffic, the Railroad Defendants herein and each of them, under the [fol. 3-12] authority of said report and order of the Commission, dated December 7, 1931, are enforcing the inadequate and confiscatory divisions illegally made effective by said Railroad Defendants on July 1, 1928, and February 1, 1929, and authorized and required by the Commission in its said report and order of December 7, 1931; that with respect to each of said shipments, the property of petitioner is being confiscated without compensation because of the enforcement and application by said Railroad Defendants of the said divisions; that on each of said shipments petitioner is deprived of large amounts lawfully due it as compensation for the transportation service performed by it, and that unless said order of the Commission, dated December 7, 1931, is set aside, in so far as it approves and authorizes the enforcement and application by said Defendant Railroads of said unlawful and confiscatory divisions, and unless the said Railroad Defendants herein, and each of them, are enjoined from enforcing and applying, in the divisions of said joint reshipping rates applying on such

transit traffic, the divisions so approved and authorized by the Commission in its said order of December 7, 1931, petitioner will sustain irreparable damage.

Wherefore, your petitioner prays:

(1) That the United States, the Commission, and The Baltimore and Ohio Railroad Company, Boston and Maine Railroad, The New York Central Railroad Company, lessee of Boston and Albany Railroad, Buffalo, Rochester and Pittsburgh Railway Company, The Central Railroad Company of New Jersey, Central Vermont Railway, Incorporated, The Chesapeake and Ohio Railway Company, Chicago and Erie Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The Delaware and Hudson Company, The Delaware, Lackawanna and Western Railroad Company, Erie Railroad Company, Grand Trunk Western Railway Company, Lehigh and New England Railroad Company, Lehigh Valley Railroad Company, Maine Central Railroad Company, The New York [fol. 3-13] Central Railroad Company, lessee of Michigan Central Railroad, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, The New York, New Haven and Hartford Railroad Company, New York, Ontario and Western Railway Company, New York, Susquehanna and Western Railroad Company, The New Jersey and New York Railroad Company, Norfolk and Western Railway Company, The Pennsylvania Railroad Company, Pere Marquette Railway Company, Reading Company, Rutland Railroad Company, Walter S. Franklin and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, and Western Maryland Railway Company be made parties defendant to this petition and that subpœnas in chancery issue out of and under the seal of this Honorable Court directed to the defendants as required by law, and that due and proper service of such process and of this petition be forthwith made by filing a copy thereof in the office of the Secretary of the Commission and another copy in the Department of Justice, and by serving a copy thereof on each of said Railroad Defendants as provided by law, and that thereby the defendants and each of them be required, on or before a date to be specified in such subpœnas or notices, to appear herein and answer this petition, but not under oath, answer under oath being hereby expressly waived.

(2) That a temporary or interlocutory injunction be entered herein restraining, enjoining and suspending, until the further order of this court, the effect and enforcement of said order of the Commission in so far as it is hereinbefore complained of as being illegal, and restraining and enjoining the Railroad Defendants herein and each of them, from enforcing or applying the divisions approved, authorized and required by the Commission in its said order of December 7, 1931, in so far as they are herein complained of as being illegal.

(3) That after final hearing, this court adjudge, order and decree that said order of the Commission, in so far as [fol. 3-14] it is herein complained of as being illegal, has at all times been beyond the lawful authority of the Commission, and that to said extent, said order be perpetually set aside, suspended and annulled and the enforcement thereof perpetually enjoined, and that the Railroad Defendants herein and each of them be perpetually enjoined from enforcing or applying as against petitioner the divisions of said joint transit rates approved, authorized and required by said Commission in its said report and order of December 7, 1931.

(4) That your petitioner may have such other and further relief in the premises as in equity and justice it is entitled to receive and as may be deemed by this Honorable Court to be adequate and proper under the circumstances.

And as in duty bound, your petitioners will ever pray, etc.

Silas H. Strawn, Frank H. Towner, Solicitors for Petitioners.

Duly sworn to by H. B. Voorhees. Jurat omitted in printing.

[fol. 3-15] APPENDIX A TO PETITION

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 22487

WILLIAM W. WHEELOCK and WILLIAM G. BIERD, as Receivers of the Railways and Property of The Chicago and Alton Railroad Company, a Corporation,

vs.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY et al.

Complaint

The complaint of the above named complainants respectfully shows:

1. That complainants are the duly appointed, qualified and acting Receivers of the railways and property of The Chicago and Alton Railroad Company, having been appointed as such Receivers under an order entered on August 30, 1922, in the case of The Texas Company v. The Chicago and Alton Railroad Company, No. 2940, pending in the District Court of the United States for the Northern District of Illinois, Eastern Division, and as such Receivers have been and are now common carriers engaged in the transportation of passengers and property wholly by railroad between points in the States of Illinois and Missouri and points in other states, and as such common carriers are subject to the provisions of the Interstate Commerce Act.

2. That the defendants herein, a complete list of whom is attached hereto as Appendix A, are common carriers engaged in the transportation of passengers and property wholly by railroad or partly by railroad and partly by water between points in the State of Illinois, and points in the States of New York, Pennsylvania and other states, and as such common carriers are subject to the Interstate Commerce Act.

3. That for many years there has been a large movement of grain, grain products and by-products of grain, in carload lots, from Trans-Mississippi River territory,

[fol. 3-16] Northern Iowa territory, Illinois-Iowa territory and Northwestern territory to Peoria and Pekin, Illinois. A detailed list of the commodities designated as grain, grain products and by-products of grain, appears in notes 5, 10 and 15 on pages 132 to 135, inclusive, of Agent Jones' Tariff No. 245-D, I. C. C. No. 2046. The origin territories named are more specifically defined in notes 25, 30, 35 and 40, at pages 137 to 144, inclusive, of said tariff. Said commodities are, for the most part, subsequently shipped from Peoria and/or Pekin, via the lines of complainants and defendants, to territory which may be generally defined as lying east of Buffalo, New York. Said destination territory is described at pages 169 to 177, inclusive, of Agent Jones' Tariff 245-D, I. C. C. No. 2046, and includes Albany, New York; Baltimore, Maryland; Belington, West Virginia; Boston, Massachusetts; Cumberland, Maryland; Hagerstown, Maryland; New York, New York; Newport News and Norfolk, Virginia; Philadelphia, Pennsylvania; Rochester, New York; Rockland, Maine; Strasburg, Virginia; Syracuse, New York and Utica, New York and other points east of Buffalo, New York, taking the same rates or arbitraries higher, to which reference is made on pages 150 to 155, inclusive, of the aforesaid tariff.

4. That for many years The Chicago and Alton Railroad Company and complainants have participated in the movement of grain, grain products and by-products of grain from Peoria and Pekin, Illinois to points in the destination territory herein specified, hauling said commodities from Peoria and/or Pekin, Illinois, to Chicago, Illinois, or intermediate junction points, and there delivering them to the defendants herein for transportation to destination. During all of said time there have been applicable to said movement of said commodities, joint through rates, and such rates are now in effect. The Chicago and Alton Railroad Company, complainants and defendants have been and are now parties to such joint through rates, which are currently published in Agent Jones' Tariff No. 245-D, I. C. C. No. 2046, and supplements thereto.

5. That the divisions of the joint through rates applicable on the movement of said commodities from Peoria

and/or Pekin, Illinois, to points in the destination territory herein specified, allowed to complainants by defendants, have been in the past, are now and will be for the future, unjust, unreasonable and inequitable, and are and have been unduly preferential of defendants and unduly prejudicial to [fol. 3-17] complainants, in violation of paragraph 4 of Section 1 of the Interstate Commerce Act.

6. That the present divisions of said joint through rates applicable on said traffic, allowed to complainants by defendants, have been in the past, are now and will be for the future, unlawful and in violation of paragraph (b) of Section 208 of Transportation Act, 1920, in that they constitute a change in the divisions of joint rates and charges which were in effect on February 29, 1920, having been made effective by defendants without the agreement of complainants and over their protest and without the approval or order of any state or federal authority.

7. Wherefore complainants pray that the defendants may severally be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants and each of them to cease and desist from the aforesaid violations of said Acts, and establish, put in force and apply in future, in the division of the joint through rates applying upon the transportation of grain, grain products and by-products of grain from Peoria and/or Pekin, Illinois, to points in the destination territory herein specified, over the lines of complainants and defendants, in lieu of the percentages now enforced upon complainants by defendants, such percentage or other division of said joint through rates, applicable as between complainants and defendants, as this Commission may deem reasonable and just; and also pay to complainants by way of reparation for the violations of the Act hereinbefore alleged, such sum as, in view of the evidence to be adduced herein, this Commission shall determine that complainants are entitled to as an award of damages under the provisions of said act for violation thereof; and that such other and further order or orders

be made as this Commission may consider proper in the premises.

Dated at Chicago, Illinois, June 18, 1929.

William W. Wheelock, William G. Bierd, as Receivers of the Railways and Property of the Chicago and Alton Railroad Company. Silas H. Strawn, Frank H. Towner, 38 So. Dearborn St., Chicago, Illinois, Counsel for Complainants.

[fol. 3-18] APPENDIX A

The Akron, Canton & Youngstown Railway Company.
The Ann Arbor Railroad Company.
Arcade and Attica Railroad Corporation.
Arcadia & Betsey River Railway Company.
Aroostook Valley Railroad Company.
Atlantic City Railroad Company.
Atlantic Coast Line Railroad Company.
Baltimore and Carolina Steamship Company of Baltimore City.
Baltimore and Eastern Railroad Company.
The Baltimore and Ohio Railroad Company.
The Baltimore and Ohio Chicago Terminal Railroad Company.
Baltimore, Chesapeake & Atlantic Railway Company.
Bangor and Aroostook Railroad Company.
Bath and Hammondsport Railroad Company.
Bellefonte Central Railroad Company.
The Belt Railway Company of Chicago.
Bessemer and Lake Erie Railroad Company.
Big Sandy and Cumberland Railroad Company.
Black Mountain Railway Company.
Blue Ridge Railway Company.
Boston and Albany Railroad (The New York Central Railroad Company, Lessee).
Boston and Maine Railroad.
Boyne City, Gaylord and Alpena Railroad Company.
Buffalo & Susquehanna Railroad Corp.
Buffalo, Rochester and Pittsburgh Railway Company.
Bush Terminal Railroad Company.
Cambria and Indiana Railroad Company.
Canada Steamship Lines (Limited).
Canadian National Railways.

Canadian Pacific Railway Company.
Catskill Evening Line (Inc.).
Central-Hudson Steamboat Company (Geo. Hutchinson and Herbert R. Odell, Receivers in Equity).
The Central Railroad Company of New Jersey.
Central Vermont Railway Company (Geo. A. Gaston and J. W. Redmond, Receivers).
The Chesapeake and Ohio Railway Company.
Chesapeake Beach Railway Company.
Chesapeake Western Railway Company.
Chestnut Ridge Railway Company.
Chicago and Erie Railroad Company.
Chicago, Attica & Southern Railroad Company.
Chicago, Indianapolis and Louisville Railway Company.
Chicago Junction Railway (The Chicago River and Indiana Railroad Company, Lessee).
Chicago, Kalamazoo and Saginaw Railway Company.
The Cincinnati, New Orleans and Texas Pacific Railway Company.
The Cincinnati Northern Railroad Company.
Clarion River Railway Company (Tionesta Valley Railway Company, Lessee).
The Cleveland, Cincinnati, Chicago and St. Louis Railway Company

Carolina, Clinchfield and Ohio Railway .....
Carolina, Clinchfield and Ohio Railway of So. Carolina .....
Clinchfield Northern Railway of Kentucky .....

(Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, Lessees).

The Baltimore and Virginia Steamboat Company.
[fol. 3-19] The Cooperstown and Charlotte Valley Railroad Company.
Cornwall Railroad Company.
Coudersport and Port Allegany Railroad.
Cumberland and Pennsylvania Railroad Company.
Curtis-Logsdon Transportation Company.
The Dansville and Mount Morris Railroad Company.
Dayton and Union Railroad Company.
The Delaware and Hudson Company.

Delaware & Northern Railroad Company (Andrew M. Moreland and James J. Welch, Receivers).
The Delaware, Lackawanna and Western Railroad Company.
The Detroit and Huron Railway Company.
Detroit and Mackinac Railway Company.
The Detroit and Toledo Shore Line Railroad Company.
Detroit, Cairo and Sandusky Railway Company.
Detroit, Toledo and Ironton Railroad Company.
East Jersey Railroad and Terminal Company.
East Jordan & Southern Railroad Company.
Elgin, Joilet and Eastern Railway Company.
Emmitsburg Railroad Company.
Erie & Michigan Railway & Navigation Co.
Erie Railroad Company.
Evansville, Indianapolis & Terre Haute Railway Company.
Fonda, Johnstown and Gloversville Railroad Company.
Frankfort and Cincinnati Railroad Company.
Genesee and Wyoming Railroad Company.
Grafton and Upton Railroad Company.
Grand Trunk Railway System (Lines in the United States East of the West Bank of the Detroit and St. Clair Rivers), comprising the following carriers:
- Canadian National Railway Company.
- The Champlain and St. Lawrence Railroad Company (Canadian National Railway Company, Lessee).
- The United States and Canada Rail-Road Company (Canadian National Railway Company, Lessee).

Grand Trunk Railway System (Lines West of Detroit and St. Clair Rivers), comprising the following carriers:
- The Chicago, Detroit and Canada Grand Trunk Junction Railroad Company (Canadian National Railway Company, Lessee).
- Cincinnati, Saginaw and Mackinaw Railroad Company (Canadian National Railway Company, Lessee).
- Detroit, Grand Haven and Milwaukee Railway Company.
- Grand Trunk Western Railway Company.
- Grand Trunk-Milwaukee Car Ferry Company.
- The Michigan Air Line Railway.
- Toledo, Saginaw and Muskegon Railway Company.

Greenwich & Johnsonville Railway Company.
The Hagerstown and Frederick Railway Company.

The Hartford and New York Transportation Company.
Hoboken Manufacturers Railroad Company.
The Hocking Valley Railway Company.
Hulett Transportation Company, a partnership.
Indiana Harbor Belt Railroad Company.
Interstate Railroad Company.
The Ironton Railroad Company (Lehigh Valley Railroad Company, Reading Company, Lessees).
Kane and Elk Railroad Company.
Lackawanna and Wyoming Valley Railroad Company.
Lake Erie, Franklin & Clarion Railroad Company.
The Lehigh and Hudson River Railway Company.
Lehigh and New England Railroad Company.
Lehigh Valley Railroad Company.
[fol. 3-20] The Lima & Defiance Railroad Company.
The Long Island Railroad Company.
The Lorain & West Virginia Railway Company.
Louisville and Nashville Railroad Company.
Louisville, New Albany & Corydon Railroad Company.
The Lowville and Beaver River Railroad Company.
Maine Central Railroad Company.
Maine Coast & Canada Steamship Co.
Manistee and Northeastern Railway Company.
Marion & Rye Valley Railway Company.
Marquette and Bessemer Dock & Navigation Company.
Maryland and Pennsylvania Railroad Company.
The Michigan Central Railroad Company.
Michigan Railroad Company (John F. Collins, Receiver).
Michigan Electric Railway Company (John F. Collins, Receiver).
The Middlesex Transportation Company.
Middletown and Unionville Railroad Company.
Montour Railroad Company.
Montpelier and Wells River Railroad.
Morristown & Erie Railroad Company.
Moshassuck Valley Railroad Company.
Mount Jewett, Kinzua and Riterville Railroad Company.
The Narragansett Pier Railroad Company.
The Nashville, Chattanooga & St. Louis Railway.
The Newark Express & Transportation Company.
The New England Steamship Company.
The New Jersey and New York Railroad Company.
New York and Hastings Steam-Boat Company.

The New York and Long Branch Railroad Company.
The New York and New Jersey Steamboat Company.
New York and Pennsylvania Railway Company.
The New York Central Railroad Company.
The New York, Chicago and St. Louis Railroad Company.
The New York, New Haven and Hartford Railroad Company.
New York, Ontario and Western Railway Company.
New York, Susquehanna and Western Railroad Company.
New York, Westchester & Boston Railway Company.
Norfolk and Washington, D. C., Steamboat Company.
Norfolk and Western Railway Company.
Northampton and Bath Railroad Company.
Norfolk Southern Railroad Company.
The North and East River Steamboat Company.
The Northern Ohio Railway Company.
Norwood & St. Lawrence Railroad Company.
Paducah & Illinois Railroad Company.
Pennsylvania and Atlantic Railroad Company (South of Hightstown, N. J. to Pemberton, N. J., inclusive, The Union Transportation Company, Lessee).
The Pennsylvania-Ontario Transportation Company (Car Ferry Route).
The Pennsylvania Railroad Company.
Pere Marquette Railway Company.
The Pittsburgh and Lake Erie Railroad Company.
The Pittsburgh & Shawmut Railroad Company.
Pittsburgh & Susquehanna Railroad Company.
The Pittsburgh & West Virginia Railway Company.
The Pittsburgh, Lisbon & Western Railroad Company.
The Pittsburgh, Shawmut & Northern Railroad Company (John D. Dickson, Receiver).
The Pontiac, Oxford and Northern Railroad Company.
Port Chester Transportation Company.
Port Huron and Detroit Railroad Company.
Prattsburgh Railway Corp.
Quebec Central Railway Company.
[fol. 3-21] The Quebec, Montreal and Southern Railway Company.
The Potomac Edison Company.
Rahway Valley Company (Rahway Valley Company, Lessee).

The Rapid Railroad Company (Security Trust Company, Receiver).
Raquette Lake Railway Company.
Raritan River Railroad Company.
Reading Company.
Reynoldsville and Falls Creek Railroad Company.
Richmond, Fredericksburg and Potomac Railroad Company.
Rutland Railroad Company.
The St. Johnsbury & Lake Champlain Railroad Company.
The Saugerties and New York Steamboat Company.
Schoharie Valley Railway Company.
Seaboard Air Line Railway Company.
Seaport Navigation Company.
Sheffield and Tionesta Railway Company.
South Brooklyn Railway Company.
Southern Railway Company.
Southern Railway Company (St. Louis-Louisville Division).
South Manchester Railroad Company.
Starin-New Haven Line.
The Staten Island Rapid Transit Railway Company.
The Stewartstown Railroad Company.
Suncook Valley Railroad.
Susquehanna and New York Railroad Company.
Tionesta Valley Railway Company.
The Toledo & Indiana Railroad Company.
Toledo and Western Railway Company.
Toledo, Peoria & Western Railroad.
The Toledo Terminal Railroad Company.
The Toronto, Hamilton and Buffalo Railway Company.
The Tuckerton Railroad Company.
Unadilla Valley Railway Company.
United Electric Railways Company.
The Valley Railroad Company (Virginia).
Virginia Central Railway.
Virginia-Southern Railroad Company.
The Virginian Railway Company.
Wabash Railway Company.
Washington and Old Dominion Railway.
Western Allegany Railroad Company.
Western Maryland Railway Company.

The Westfield Railroad Company.
West Jersey and Seashore Railroad Company.
West Ports Steamship Line.
West Shore Railroad (The New York Central Railroad Company, Lessee).
West Virginia Midland Railway Company.
West Virginia Northern Railroad Company.
Wharton and Northern Railroad Company.
The Wheeling and Lake Erie Railway Company.
Wildwood and Delaware Bay Short Line Railroad Company.
The Wilkes-Barre and Eastern Railroad Company.
The Wilkes-Barre and Hazleton Railway Company.
Williamsport & North Branch Railway Company.
The Winfield Railroad Company.
The Winona Railroad Company.
Wisconsin & Michigan Railroad Company.
Wisconsin & Michigan Transportation Company.
Wood River Branch Railroad Company.
Yale Short Line Railroad Company.
The Youngstown & Ohio River Railroad Company.

[fol. 3-22] APPENDIX B TO PETITION

No. 22487

WILLIAM W. WHEELOCK and WILLIAM G. BIERD, as Receivers of Railways and Property of Chicago & Alton Railroad Company

v.

AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY et al.

Submitted May 22, 1930. Decided November 28, 1930

Divisions accorded complaints of joint reshipping or proportional rates, and of joint nontransit rates, on grain, grain products, and grain by-products, in carloads, from Peoria and Pekin, Ill., via Chicago, Joliet, or Dwight, Ill., to destinations in eastern trunk-line and New England territories, found un-

just, unreasonable, and inequitable. Reasonable and nonprejudicial divisions prescribed for the future.

Silas H. Strawn and Frank H. Towner for complainants.
D. P. Connell and J. L. Aber for defendants.

Report of the Commission

Division 5, Commissioners Lewis, Porter, and Farrell

By Division 5:

Exceptions were filed by complainants and defendants to the report proposed by the examiner. We have reached conclusions which differ from those suggested by him.

Complainants are the receivers of the Chicago & Alton Railroad Company, and they and the company will be referred to herein as the Alton.

By complaint filed June 21, 1929, it is alleged that for many years there has been a large movement of grain, grain products, and the by-products of grain, in carloads from districts known as trans-Mississippi River, northern Iowa, Illinois-Iowa, and northwestern territories to Peoria and Pekin, Ill.; that said commodities, or the greater part thereof, are subsequently shipped from Peoria and Pekin, [fol. 3-23] under transit-privilege regulations and practices, over the rails of the Alton and of the defendants, to destinations east of Buffalo, N. Y.; that in such outbound movements from Peoria and Pekin the Alton hauls the shipments to Chicago, Ill., or to intermediate junction points, where they are transferred to the rails of defendants for transportation to eastern destinations; that there have been and are joint rates applicable to these movements from Peoria and Pekin to the eastern destinations; and that the divisions of such joint rates, on said commodities from Peoria and Pekin to the eastern destinations, allowed the Alton by defendants, have been, are now, and will be unjust, unreasonable, inequitable, and unduly prejudicial to complainants, in violation of paragraph 4 of section 1 of the interstate commerce act. It is further alleged that the divisions of such joint rates allowed by defendants to the Alton have been, are now, and will be, unlawful and in violation of paragraph (b) of section 208 of the transportation act, 1920, in that they constitute a change in the divisions which were in

effect February 29, 1920, made by defendants without agreement with the Alton, over its protest, and without requirement by any State or Federal authority. The prayers are for reasonable and just divisions of such joint rates and for reparation. Rates will be stated in cents per 100 pounds, and divisions in cents and in percentages as indicated.

The distance between Peoria and Pekin is less than 10 miles, and the inbound and outbound rates on these commodities to and from these points and the transit regulation and practices in effect there are generally the same. The record refers mainly to Peoria, and that point will be treated as representative of both. The destinations, of which New York, N. Y., is representative, are east of Buffalo in eastern trunkline and New England territories. The Alton has other junction points through which this traffic may move eastbound, but those here concerned are Chicago, Joliet, and Dwight, Ill. From Peoria the Alton's hauls are 155 miles to Chicago, 118 miles to Joliet, and 82 miles to Dwight. Joliet and Dwight are Chicago rate points, and, as the Alton's haul to Chicago is the longest it can have on any of this outbound traffic to eastern points, Chicago proper will be referred to as the interchange point.

The principal issue is, what division or divisions should accrue to the Alton out of joint rates on these commodities from Peoria to New York when the movement is through Chicago, Joliet, or Dwight. This issue arises concerning two [fol. 3-24] types of shipments. The first are known as local shipments, that is, shipments of grain, grain products, or by-products of grain which originate in Peoria or on which the transit period has expired. The second type consists of shipments which move on what are known as reshipping or proportional rates. Most of the shipments from Peoria move on reshipping or proportional rates. Such outbound shipments are of commodities which it is agreed are the same as, or the product of, or a by-product from, some prior shipment which has moved into Peoria, from one of the territories of origin named, within the period of 12 months.

The rate from Peoria to New York on grain products originating at Peoria is 42 cents, minimum 40,000 pounds. The reshipping or proportional rates, subject to the same minimum, from Peoria to New York are much lower, and vary according to the origins described in the tariff, as follows:

On shipments which originated in—

	Cents
Trans-Mississippi River territory	32.5
Northern Iowa territory	31
Illinois-Iowa territory	32.5
Northwest territory	30.5

From Chicago to New York the applicable rates on grain products are 38.5 cents local and 30.5 cents reshipping or proportional. The proportional rate from Chicago applies without restriction of territory of origin but only on shipments which originate beyond Chicago and on which the inbound freight rate is 8 cents or more. We shall consider first the divisions of the proportional rates.

On shipments linked to inbound movements from or through Kansas City, Mo., the proportional rates from Peoria are uniformly made as much more than the proportional rates from Chicago, and as much less than the proportional rates from St. Louis, Mo., as the inbound rates to Peoria are less than the inbound rates to Chicago or more than the inbound rates to St. Louis; in other words, the rates on the through movement from Kansas City to eastern destinations via Chicago, St. Louis, and Peoria are equalized. The inbound rates to Peoria from all origin territories named over all lines are in some instances the same and in others a maximum of 2 cents lower than the rates to Chicago, dependent upon the particular territory of origin, and this accounts for the varying proportionals out of Peoria, the divisions of which are here under attack. Trans-Missis- [fol. 3-25] sippi River traffic is required by tariff to move through Missouri River crossings, of which the Alton serves only Kansas City, Mo. A part of this east-bound traffic, moved by the Alton from Peoria, is received by that road at Kansas City and is transported thence to Chicago; but the greater volume is moved to Peoria by other western carriers not parties to this proceeding. The Alton also serves a few Illinois points embraced in Illinois-Iowa territory, but, aside from points in that and trans-Mississippi River territory, it can never obtain both the inbound and outbound haul of any shipments through Peoria. Two other carriers serving Peoria, the Chicago, Burlington & Quincy and the Chicago, Rock Island & Pacific, have their own rails between Kansas City and Chicago. The rate

situation on this traffic and the divisions of the applicable rates are the same over the routes of all these lines, but only the Alton is here complaining.

The rate on trans-Mississippi River traffic from Kansas City to Chicago, applicable over all lines, is 16 cents, and to Peoria is 14 cents. The same difference of 2 cents is maintained on traffic from Illinois-Iowa territory. From northern Iowa it is only 0.5 cent, and from the Northwest the rates to both Peoria and Chicago are the same. The differences, if any, in the proportional rates outbound from Peoria and Chicago to the East on traffic from these respective territories are the same as those in the inbound rates. On all of this inbound traffic the division or revenue received by the carrier or carriers west of Chicago or other junctions with the eastern carriers is the same as the inbound rate to the junction, whether the shipment is accorded transit at some intermediate point or not. On a shipment from the territories named, delivered to the Alton at Peoria for movement eastbound through Chicago, the division received by the Alton is a maximum of 2 cents or a minimum of nothing, depending upon the territory of origin, and it is of these divisions that the Alton complains.

The Alton contends that just and reasonable divisions on this traffic would be those on basis of the percentages east and west of its junction with the eastern lines which are now reflected by the divisions of the contemporaneous first-class rates from Peoria to the eastern destinations. For example, on an actual shipment of feed, weighing 35,600 pounds, from Peoria to Hall, N. Y., on the Pennsylvania, 1,072, miles, on which the Alton's haul to Joliet, where it was delivered to the Elgin, Joliet & Eastern, was 118 miles, [fol. 3-26] the rate charged was 26 cents and the total charges were $92.56. The Alton, applying the first-class percentages, would divide this rate 34.01 per cent to it and 65.99 per cent to the two eastern lines, or $31.49 for its haul of 118 miles and $61.07 for the haul of 954 miles over the eastern lines. Again, on an actual shipment of livestock feed, weighing 28,320 pounds, from Peoria to New Berlin, N. Y., over the Alton to Chicago, Wabash to Black Rock, N. Y., Delaware, Lackawanna & Western to Bridgewater, N. Y., and Unadilla Valley beyond, 1,161 miles, the rate charged was 33 cents and the total charges were $93.46.

The Alton, again applying the same basis for divisions, would divide this rate 32.43 per cent to it and 67.57 per cent to the eastern lines, or $30.31 for its haul of 155 miles and $63.15 for the haul of 1,006 miles over the eastern lines.

Defendants claim that they are entitled to retain their 30.5 cent proportional rate east of Chicago whether the grain products come from connections in through continuous movement or from such connections after receiving transit at Chicago or any point intermediate thereto. They take the position that the participation of the Alton in traffic from the Northwest coming to it at Peoria short hauls all carriers handling the inbound traffic to Peoria, except the Minneapolis & St. Louis, which is the only carrier serving Peoria and the Northwest that does not also serve Chicago; that all of this traffic could move to Chicago and be accorded transit there, in which event there would be no question about the western roads receiving their local rate to Chicago and the eastern roads their reshipping rate from Chicago; and that the movement from initial point of shipment to Chicago and Chicago junctions, stopped at Peoria for transit, being entirely over the rails of the western carriers, if the Alton desires to continue in this traffic and is not satisfied with its present earnings thereon, it should look to the inbound carriers to Peoria and not to the carriers east of Chicago. They point out that the granting by the Peoria lines of transit at that point results in handling this traffic from the Northwest over circuitous routes, and contend that lines east of Chicago should not be penalized because the originating lines in the western district prefer to take their long haul by way of Peoria to Chicago, and should not accord to the Alton a division or divisions which would make more desirable its participation in this traffic.

For the haul of the Alton from Peoria to Chicago the maximum division of 2 cents yields apparent revenues of [fol. 3-27] 2.58 mills per ton-mile and, based on a minimum carload of 40,000 pounds, 5.16 cents per car-mile and $8 per car. On traffic through Joliet and Dwight its ton-mile and car-mile revenues would, of course, be somewhat higher. On most of the shipments received by the Alton at Peoria and delivered to its eastern connections at Chicago or Joliet it absorbs total switching charges amounting to from $6 to $12 per car. The Alton attempted to prove, also, that

its unit cost of handling this traffic is greater than that incurred by the principal defendants receiving the traffic from it. Its haul from Peoria to Dwight en route to Joliet or Chicago is over a branch line on which the traffic density is light. Thus, on traffic interchanged at Dwight its entire haul is on a branch line, and on traffic interchanged at Joliet or Chicago the major portion of its haul is over the same branch line. In contrast, the eastern carriers receiving the traffic haul it for relatively much greater distances over their main lines. Examples of these hauls on actual shipments indicate that main-line movements of 600 and 700 miles over the lines of the eastern carriers are common. No satisfactory comparative figures of the density over the respective lines handling this traffic appear of record. No contention is made that the Alton or any of defendants is not efficiently operated.

The Alton regards itself as the originating carrier of this traffic at Peoria, and it refers to several cases concerning divisions of rates in which we have given major consideration to the fact that complainants therein were either originating or delivering carriers and therefore entitled to a greater proportion of the rate than an intermediate carrier. This attitude of the Alton is based upon its contention, consistently maintained throughout this proceeding, that the outbound shipments from Peoria on these proportional rates are entirely separate and distinct from all prior transportation, and that in determining the just and reasonable divisions which it should receive under the proportional rates no consideration should be given to the facts that the shipments moving thereunder must have had previous movement into Peoria; that the inbound billing exchanged for the billing covering the outbound movement will not be accepted unless the latter shipment is offered within the time limit specified in the transit provisions; and that the through rate applied is that in effect at the time of initial shipment of the inbound movement to Peoria. That the outbound shipment is separate and distinct from that inbound, it contends, is definitely established by the deci- [fol. 3-28] sion of the Supreme Court in A. T. & S. F. Ry. v. United States, 279 U. S. 768, wherein, in determining the legality of an order of this commission which required cancellation of proposed increased inbound rates on grain to Kansas City, the transit point, the court said:

Obviously, this practice cannot convert the independent shipment of grain from Kansas City to the Gulf via the Southern into a through movement from Dodge City to the Gulf. The two transportation services are not only entirely distinct, but they are often rendered in respect to wholly different merchandise. This convenient fiction is employed as a justification for the discrimination involved in giving rates lower than those ordinarily applicable to the service outbound.

These proportional rates for the transportation outbound from Peoria to destinations east of Buffalo are separately established and jointly published by the carriers which participate in such outbound transportation, while another set of carriers publish and file the rates applied to the transportation from points of origin to Peoria. Section 1 (4) provides that the carriers making such rates shall "establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers." Section 15 (6) is, so far as applicable, as follows:

Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, * * * In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also [fol. 3-29] whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without

regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

We are of opinion that the divisions of the proportional rates on grain, grain products, and grain by-products, from Peoria to eastern destinations, as set forth herein, are and will be unjust, unreasonable, inequitable, and unduly prejudicial to the Alton and unduly preferential of its connections having rails east of Chicago and Chicago junctions. Before prescribing just, reasonable, and equitable divisions of such joint rates, however, we must give due consideration, among other things, to certain facts and circumstances, set forth in the statute, which would ordinarily, without regard to the mileage haul, entitle the Alton to a greater or less proportion than its connections out of these joint rates.

The lines of all parties are efficiently operated. There is no doubt concerning the importance to the public of their transportation services. The Alton is in effect the originating line; and the defendants hereto are either intermediate or delivering lines, or are both intermediate and delivering lines.

Any divisions of these joint rates which we have power to prescribe will aid the Alton only toward attaining the amount of revenue required to pay its operating expenses and taxes. A fair return on the Alton's railway property held for and used in this service of transportation is brought in question here only to the extent that fair divisions of the rates on these commodities may contribute thereto. The Alton is in the hands of receivers. We may take this fact into consideration, but we may not base our conclusions wholly thereon. United States v. Abilene & S. R. Co., 265 U. S. 274; New England Divisions Case, 261 U. S. 184.

Assuming the accuracy of the distances used in the Eastern Livestock Cases of 1926, 165 I. C. C. 277, as shown on page 300, the short line from Chicago to New York is 900 miles; and from Peoria to New York, 1,055 miles by the route here contemplated. The mileage from Peoria to Chicago, therefore, is 14.7 per cent of that from Peoria to New York. Comparisons of the Alton's haul on shipments to interior points close to Buffalo would show much higher

percentages, just as these percentages would be lower on shipments to New England destinations. Complainants, [fol. 3-30] however, seek higher divisions than 15 per cent, an make some effort to claim divisions based upon the percentages by which first-class rates are divided. Taking into consideration all the circum-tances and conditions shown here, we are of opinion, and therefore find, that out of the proportional joint rates on grain, grain products, and grain by-products, as limited by the tariffs now in effect, from Peoria to destinations east of Buffalo, the Alton's proportional share should be 20 per cent of the published rate from Peoria to destination. Testing this percentage by the highest proportional rate to New York City, 32.5 cents, the Alton's share, on traffic exchanged through the junctions first named, would be 6.5 cents, or $26 per minimum carload. On certain local shipments originating at Peoria the Alton now receives a maximum of 20 per cent.

We come now to a consideration of the division of the local or nontransit rates from Peoria. The local rate of 42 cents on grain products from Peoria to New York will be used as illustrative. While these rates are generally referred to as local rates, to distinguish them from proportional or reshipping rates, they are in fact joint rates concurred in by the Alton and its eastern connections. They apply whenever the grain or its products have actual origin in Peoria, or whenever the time limit on transit commodities within which the lower reshipping rates apply has expired. There is an appreciable movement of such nontransit commodities from Peoria to eastern destinations. The division accorded the Alton of such local rates from Peoria to eastern destinations is 20 per cent. On a minimum carload of 40,000 pounds to New York the total revenue is $168, and the Alton's share is $33.60. If defendants retained only their reshipping rate of 30.5 cents east of Chicago the Alton would receive $46.

Peoria is in the group of origin points from which rates on classes and generally on commodities to eastern destinations are based upon the corresponding rates from Chicago to New York, plus 10 per cent. In other words, it is what is known as a 110 per cent point. The 42-cent rate to New York happens to be 109.6 per cent of the local rate of 38.5 cents from Chicago to New York. The Chicago-New York percentage basis has not been employed in making the local

rates on grain or its products from points from which the rates are higher than from Chicago. Such rates are made by adding arbitraries or specifics to the Chicago proportional rates. From Peoria this arbitrary or specific is 11.5 cents, which, added to the Chicago proportional rate of 30.5 [fol. 3-31] cents makes the rate of 42 cents to New York. The Alton contends that it is entitled to retain this entire arbitrary. To this claim defendants raised no serious objection, either at the hearing or on brief, and they have filed no exception to the recommended finding of the examiner that the Alton's claim in this respect be allowed. They have manifested no intention, however, of according the Alton the division sought on this traffic.

Up to a number of years ago these local rates were stated in two parts, one the reshipping rate from Chicago east, and the other the specific to Chicago. Grain Rates in Central Freight Association Territory, 28 I. C. C. 549. In that case certain increases in the specifics to Chicago were found justified and this statement appears on page 558:

> The grain shipper of Illinois is entitled to a reasonable rate by the direct line. If the line via Chicago cannot obtain reasonable compensation when operating over the circuitous route it can retire from the business.

On general traffic from Peoria proper, moving via Chicago to New York, a percentage allowance of 20 per cent to western roads has been in effect since April 15, 1913. This allowance is limited by its terms to apply only on shipments which originate at Mississippi River points proper, from East St. Louis, Ill., to East Dubuque, Ill., inclusive, and points east thereof, which includes Peoria, but the division circular announcing this allowance provides that such percentage divisions "are to be used only in the division of through rates based on the agreed percentage rate basis of Chicago-New York rates." Rates on grain and its products from Peoria, as before stated, are not made on that basis. This same circular which is still in effect, further provides that on freight from points on western roads which takes "certain arbitraries above the scale basis of Chicago-New York rates, such arbitraries are to be deducted before prorating and allowed the western roads." It is evident that defendants are not complying with this provision of

the division circular. Defendants' services east of Chicago to these destinations accorded shipments from Peoria on which the local rate applies are no different from those accorded shipments moving from Peoria on the reshipping rates.

Taking into consideration all matters and things as required by the act, we find that for the future nontransit, or local, rates on grain, grain products, and by-products from Peoria to destinations east of Buffalo should divide as [fol. 3-32] made; the arbitrary, or specific, from Peoria to Chicago to be allowed in all instances to the Alton, and the balance, or reshipping or proportional rate from Chicago to destination, to be given the lines east of Chicago.

We have no authority to enforce agreements respecting divisions or to enforce the requirements of section 208 (b) of the transportation act, 1920, Hampton & Branchville R. R. & L. Co. v. A. C. L. R. R. Co., 88 I. C. C. 77, 84. Nor, on this record, have we authority to require a readjustment of the divisions of transit, or proportional, rates or of nontransit, or local, rates on the commodities; for there is no showing that any of these rates, from Peoria and Pekin to eastern destinations, were established pursuant to a finding or order of the commission under section 15 (1) or (3). Brimstone R. R. Co. v. United States, 276 U. S. 104.

An appropriate order for the future will be entered.

PORTER, Commissioner, dissenting in part:

The findings of the majority herein with respect to the divisions of the proportional or reshipping rates from Peoria seem to me clearly in error. They are based upon observations made by the Supreme Court in A., T. & S. F. Ry. v. United States, 279 U. S. 768. The question before the court in that case was whether the order of the commission condemning proposed increased inbound rates to Kansas City was within the commission's power. The court found in the affirmative, and then proceeded to discuss the transit provisions in effect at Kansas City and the outbound rates therefrom, neither of which were before it. In that discussion the court made the observations, quoted by the majority herein, that the transportation services to and from the transit point were "entirely distinct,"

and that the practice of according transit could not convert the outbound shipment of grain from the transit point into a through movement from the point of initial shipment to the final destination. It is evident that the observations referred to are obiter dicta and, therefore, binding neither upon that court nor upon us.

The Supreme Court recognized in Central R. R. Co. v. United States, 257 U. S. 247, that transit privileges such as those here before us rest "upon the fiction that the incoming and outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination." In Grand Rapids and I. Ry. Co. v. United States, 212 Fed. 577, [fol. 3-33] the court said that before the benefits of a transit shipment can be accorded, some relation must in fact exist between the proposed outbound shipment and an inbound shipment. Practicable transit, especially on grain, could not exist without according to the shipper the right to bill his shipments to the transit point in the first place and subsequently rebill them or their equivalent to a new and final destination, for the obvious reason that the final destination is not and can not be known at the time of initial shipment. Transit arrangements represent a departure from ordinary transportation service, under which shippers are accorded a more favorable basis of rates than would obtain if the inbound and outbound movements were treated as separate shipments. Montgomery Cotton Exchange v. L. & N. R. R. Co., 112 I. C. C. 325, 329. To treat the inbound and outbound shipments as separate and distinct is hopelessly repugnant to the principle of transit, which is that the same commodity although generally in changed form, which moves to the transit point shall move therefrom to a new destination, and that the shipment from the point of origin through the transit point to destination is the same in principle as if the shipment had moved through without transit. Maley & Wertz v. Louisville & N. R. Co., 36 I. C. C. 657; Board of Trade of Chicago v. Ann Arbor R. Co., 39 I. C. C. 643; Columbia Malting Co. v. New York Central R. Co., 53 I. C. C. 137. The underlying theory of transit is that of a continuous transportation from the point of origin to the ultimate destination. Peoria Board of Trade v. Atchison, T. & S. F. Ry. Co., 55 I. C. C. 42; Capital Warehouse Co. v. Director General, 66 I. C. C. 683. This must be so for the

only rates applicable on transited shipments are those in effect at the time of the initial shipment, and this is true even though they move at combination rates to and from the transit point. Larabee Flour Mills Corp. v. Atchison, T. & S. F. Ry. Co., 148 I. C. C. 5. We have never had occasion to condemn transit arrangements such as those in effect on grain and grain products at Peoria, and I can find not a single case, wherein the issue was squarely raised, in which any court has questioned the legality of transit provisions such as those here before us, or the principle or theory of transit as it has been uniformly recognized and applied ever since transit became known in the commercial world. Wherever the issue has been raised the courts have uniformly agreed with the commission that transit privileges, properly applied, were beneficial to both carrier and shipper. Blodget Milling Co. v. Chicago, M. & St. P. Ry. [fol. 3-34] Co., 23 I. C. C. 448; In Re Rates and Charges on Grain and Products, 91 I. C. C. 195; Grand Rapids and I. Ry. Co. v. United States, supra. The Supreme Court recognized, in Central R. R. Co. v. United States, supra, that the commission has the power, under section 1 of the act, to require reasonable or to discontinue unreasonable transit services.

Under all of these circumstances is it the part of wisdom for this commission now, after all of these many years of approbation, by court and commission alike, of a practice which antedates the interstate commerce act itself, Transit Case, 24 I. C. C. 340, 348, to throw into the discard a principle or theory which is inseparably bound up with the practice of transit, which has been and is beneficial to both carrier and shipper, and which has been ingrained into and become an exceedingly important part of the business structure of the country, solely because of obiter dicta observations made by the Supreme Court?

The foregoing discussion is made necessary by reason of the majority's view that the expressions of the Supreme Court referred to require us, notwithstanding the plain terms of the tariffs to the contrary, to regard the proportional outbound rates from Peoria as entirely distinct from the prior inbound transportation to which the tariff links them, and that, therefore, the Alton must be treated as an originating carrier in its handling of the outbound shipments which have received transit at Peoria. It is my view

that, transit provisions such as those in effect at Peoria never having been condemned either by us or by any court, and moreover since their lawfulness is not here before us, we must give full effect to those provisions in our consideration of the lawfulness of the divisions received by the respective carriers participating in these outbound reshipping rates. Those provisions link together the outbound and inbound shipments from and to Peoria so as to make them parts of a through movement from initial point of shipment through Peoria to final destination. Thus regarded, the proportional rates from Peoria are merely parts of the through rate, and the Alton is only an intermediate and not an originating carrier on such traffic receiving transit at Peoria. Counsel for the Alton practically admitted at the hearing in this case, that, if so regarded, its claim for increased divisions of these proportional rates from Peoria would have to fail. The reason this must be so is easily demonstrated. Since the difference between the inbound rates and the outbound rates from and to Peoria [fol. 3-35] on the one hand and Chicago on the other is in each instance the same, as it must be if the present equalization is to be maintained, to accord a division to the line handling the traffic from Peoria to Chicago greater than the difference between the rates to or from Peoria and Chicago, which on trans-Mississippi River traffic is 2 cents and on northwestern traffic is nothing, would result in according to the carriers west of Chicago a greater proportion of the revenue on the through movement from point of initial shipment to final destination than such carriers now receive on the direct movement to Chicago. In other words, the Alton would receive greater revenue on a shipment from Kansas City, for example, to Chicago, accorded transit at Peoria, than it would on a like shipment moved direct to Chicago. Also, the lines east of Chicago would then be forced to accept less revenue on a shipment accorded transit at Peoria than on a shipment originating at the same point but accorded transit at Chicago or any intermediate point other than Peoria west of Chicago. The transportation services performed by defendants east of Chicago on all of such shipments are the same, and this record refers to no transportation reason for requiring defendants to accept less or different revenue on one than on the other.

To illustrate, on a carload of grain products billed through from trans-Mississippi River territory to New York, the Alton, for its share of the haul from Kansas City to Chicago, now receives 16 cents; and the lines east of Chicago receive their full reshipping rate of 30.5 cents. Under the divisions in issue the same amounts now accrue, respectively, to the lines west and east of Chicago. Contrast this balancing of revenues with that which the majority requires on a shipment similar in all respects to that above save that transit is had at Peoria. The rate from Kansas City to Peoria is 14 cents, and out of the outbound rate from Peoria to New York, 32.5 cents, the majority say the Alton is entitled, for its haul to Chicago, to a division of 20 per cent, or 6.5 cents, a total for the haul from Kansas City to Chicago of 20.5 cents. This leaves for the lines east of Chicago a balance of only 26 cents. The showing on grain products having origin in northwestern territory is even plainer. There are no joint rates from this territory through Peoria to Chicago, but the rates to Peoria and to Chicago are the same. Under the majority report, however, on such grain transited at Peoria and moved thence by the Alton to Chicago, the lines east of Chicago, on a shipment to New York, would have to pay the Alton out of the rate of 30.5 cents from Peoria, which is the same as the rate [fol. 3-36] from Chicago, 6.1 cents. The remainder of 24.4 cents to the eastern lines would yield over the short line, on a minimum carload, less than 10.84 cents per car-mile. Under the full 30.5-cent rate the yield is little enough, about 13.5 cents per car-mile.

While the route via Peoria and the Alton to Chicago on northwestern traffic and on traffic from the eastern portion of northern Iowa territory is circuitous, it cannot be said, taking into consideration the haul from point of initial shipment to final destination, that the Peoria route is unduly circuitous on any of this traffic. This is not saying, however, that the route of the Alton on any of this traffic received by it at Peoria and hauled over its line to Chicago or Chicago junctions is necessary or desirable in the public interest, for upon this record we have no evidence to indicate that such is the fact. The proportional rates from Peoria apply in connection with the Alton, not only via Chicago and Chicago junctions, but also via junctions south of Dwight, such as Chenoa, Ill., to which the haul of the Alton

is considerably shorter than to Dwight, and it is not necessary for this traffic, after it reaches the Alton, to move via its northern junctions. If it is to move over the Alton at all, it should and can move via its junctions south of Dwight. Prior to the present rate equalization through the various gateways, by rates breaking thereon, the joint rates then in effect from the Northwest to eastern destinations did not apply via Peoria on traffic through Chicago. On grain and by-products from the Northwest the proportional rates from Peoria are now restricted so as not to apply via Chicago. The same restrictions should be made on grain products.

I want to add an observation with regard to the applicability to the issues before us of the decision in A., T. & S. F. Ry. v. United States, supra. As stated, the majority believe that decision to be controlling here in the respect that the movement of the Alton under proportional rates from Peoria must be regarded as without relation to the inbound movement, and it is for that reason that I have gone into some discussion of it. But the fact is that the court in that case was not concerned with any question of divisions, and there is no suggestion in that decision that in determining the just and reasonable divisions of proportional rates from a transit point we may not give consideration to the facts relating to the inbound movement. In prescribing and determining divisions the law requires us to give due consideration, in addi-[fol. 3-37] tion to the matters specifically enumerated in section 15 (6), to "any other fact or circumstances which ordinarily without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of a joint rate, fare or charge." Even allowing to the obiter dicta expressions of the court in that case the full weight ascribed to them by the majority, I find nothing in that decision which would preclude us from giving consideration to the fact of the prior inbound movement, which fact is a part of the record, in determining the just and reasonable divisions of these outbound proportional rates. Given consideration, that fact, for the reasons already stated, permits of only one conclusion, namely, that the present divisions accorded the Alton on this proportional traffic are not unlawful.

Were the shipments with which we are here dealing billed through from points of initial shipment via Peoria and the Alton to eastern destinations, these same proportional rates would apply beyond Peoria, and such shipments, even if stopped at Peoria for transit, could properly be regarded

as through shipments. See A., T. & S. F. Ry. v. United States, page 780. No one would say that on such shipments the lawfulness of the divisions of the proportional rates from Peoria might not be determined by considering, among other things, the fact that the outbound movement is but a part of the through movement from point of origin to final destination. Can it be that the method of billing makes a difference, and that if a shipment is billed to Peoria and later reshipped under and in accord with the transit provisions, which must here be deemed to be reasonable, we must shut our eyes to the fact that the shipment had prior inbound movement, despite the fact that it was accorded exactly the same services and handled in all respects, except in the method of billing, the same as the shipment billed through? The courts and the commission have so often looked beyond the method of billing, except where the applicability of particular tariff provisions was concerned, that the answer to that question is easily in the negative.

One thing is plain: If the view of the majority as reflected in this case is to be the law, then radical changes must be made, not only in the divisions of a multitude of rates, but in transit arrangements at numerous points on grain and grain products, cotton, lumber, and other commodities which have been in effect for many years, have become an exceedingly important part of the industrial structure of this country, and have been specifically approved by this commission and never, to my knowledge, specifically disapproved by any court.

[fol. 3-38] Order

At a Session of the Interstate Commerce Commission, Division 5, Held at Its Office in Washington, D. C., on the 28th Day of November, A. D. 1930

No. 22487

William W. Wheelock and William G. Bierd, as Receivers of the Railways and Property of the Chicago and Alton Railroad Company,

v.

The Akron, Canton & Youngstown Railway Company, et al.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties,

and full investigation of the matters and things involved having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and said division having found in said report that just, reasonable, and equitable divisions to be received, respectively, by complainants William W. Wheelock and William G. Bierd, as receivers of the railways and property of the Chicago and Alton Railroad Company, and the defendant carriers east of Chicago, Joliet, or Dwight, Ill., out of the present joint transit or reshipping rates on grain, grain products, and grain by-products, in carloads, from Peoria and Pekin, Ill., over the lines of complainants to Chicago, Joliet, or Dwight, destined to points in eastern trunk-line and New England territories east of Buffalo, N. Y., will be 20 per cent to complainants and the remainder to the carriers east of Chicago, Joliet, or Dwight;

And, said division having found further in said report that just, reasonable, and equitable divisions to be received respectively by said complainants and by the defendant carriers east of Chicago, Joliet, or Dwight out of the joint nontransit rates on grain, grain products, and grain by-products, in carloads, from Peoria and Pekin to Chicago, Joliet, or Dwight, over the lines of complainants to Chicago, Joliet, or Dwight, destined to points in eastern trunk-line and New England territories, east of Buffalo, will be the specific or [fol. 3-39] arbitrary over the Chicago reshipping rate to complainants and the reshipping rate from Chicago to destination to the carriers defendant east of Chicago:

It is ordered that the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before March 10, 1931, and thereafter to abstain, from asking, demanding, collecting, or receiving divisions of the joint rates specified in the preceding paragraphs which do not allow said complainants the divisions found in said report to be just, reasonable, and equitable.

And it is further ordered that this order shall continue in force until the further order of the commission.

By the Commission, division 5.

George B. McGinty, Secretary. (Seal.)

[fol. 3-40] APPENDIX C TO PETITION

INTERSTATE COMMERCE COMMISSION

No. 22487

WILLIAM W. WHEELOCK and WILLIAM G. BIERD, as Receivers of Railways and Property of Chicago & Alton Railroad Company,

v.

AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY, et al.

Submitted October 1, 1931. Decided December 7, 1931

Divisions accorded complainants of joint reshipping or proportional rates on grain, grain products, and grain by-products, in carloads, from Peoria and Pekin, Ill., via Chicago, Joliet, or Dwight, Ill., to destinations in eastern trunk-line and New England territories not found unjust, unreasonable, or otherwise unlawful.

Divisions accorded complainants of joint nontransit rates on the same commodities from and to the same points found unjust, unreasonable, and inequitable. Reasonable and equitable divisions prescribed for the future.

Original findings, 169 I. C. C. 594, modified in part.

Silas H. Strawn, Frank H. Towner, and Guy A. Gladson for complainants.

D. P. Connell and J. L. Aber for defendants.

Report of the Commission on Rehearing

PORTER, Commissioner:

Complainants excepted to the report on rehearing proposed by the examiner, to which exceptions defendants replied. Complainants will be referred to as the Alton.

The Alton seeks increased divisions of joint rates on both transit and nontransit grain, grain products, and grain by-products, in carloads, from Peoria and Pekin, Ill., via Chi- [fol. 3-41] cago, Joliet, or Dwight, Ill., to eastern trunk-line and New England destinations. In a prior report, 169 I. C. C. 594, a majority of division 5 found that for the

future the transit rates in issue should be divided by allowing the Alton 20 per cent thereof for its services to Chicago, Joliet, or Dwight, the balance to accrue to its connections east of those junctions, and that the non-transit rates should divide as made; that is, the arbitrary, or specific, to Chicago to be allowed to the Alton, and the balance, or the reshipping or proportional rate from Chicago to destination, to be given to the lines east of Chicago. Thereafter, on petition of defendants, the effective date of the order giving effect to those findings was postponed indefinitely and the proceeding reopened for rehearing, which has been had.

The essential facts, about which there is no dispute, are correctly stated in the prior report, except as will later appear, and they will be detailed herein only to the extent necessary to a clear understanding of the issue before us. Those facts were supplemented at the rehearing by only one additional fact of importance, namely, the acquisition and operation by the Alton Railroad Company of the lines of railroad formerly constituting the Chicago & Alton Railroad system, and the acquisition by the Baltimore & Ohio Railroad Company, hereinafter called the Baltimore & Ohio, of control of the Alton Railroad Company by purchase of capital stock, approved by us in Alton R. Co. Acquisition and Stock Issue, 175 I. C. C. 301. The Baltimore & Ohio is one of the eastern lines here defendant.

Defendants are satisfied with the finding made in the former report with respect to the future divisions on nontransit traffic, and those divisions will not be further considered. Rates will be stated in cents per 100 pounds, and divisions in cents and percentages as indicated.

The divisions to be considered are those for the haul of the Alton from Peoria or Pekin to Chicago, Joliet, or Dwight on grain, grain products, and grain by-products, in carloads, from districts described in the governing tariff as Trans-Mississippi River, northern Iowa, Illinois-Iowa, and northwestern territories, moved to Peoria and Pekin over various lines and subsequently reshipped under transit provisions over the Alton and its eastern connections here defendant to destinations east of Buffalo, N. Y. Taking grain products from Peoria to New York, N. Y., as typical, the applicable rates are 42 cents on nontransit or local [fol. 3-42] shipments originating at Peoria, and 32.5, 31,

32.5, and 30.5 cents, respectively, on transit shipments having origin in Trans-Mississippi River, northern Iowa, Illinois-Iowa, and northwestern territories, respectively. Most of the shipments from Peoria move on one or another of the four proportional or reshipping rates last named, and it is the divisions of these rates which are in issue. The outbound shipments moving thereunder are commodities which it is agreed are the same as, or the products of, or the by-products from, some prior shipment which has moved into Peoria, from one of the territories of origin named, within the period specified in the transit provisions applicable at Peoria. The hauls of the Alton from Peoria are, respectively, 155 miles to Chicago, 118 miles to Joliet, and 82 miles to Dwight. The latter two points generally take Chicago rates. Chicago will be referred to as the interchange point, but it should be borne in mind that the average haul of the Alton on this traffic is considerably less than 155 miles. From Chicago to New York the applicable rates on grain products are 38.5 cents local and 30.5 cents reshipping or proportional. The rates on the through movement from the respective origin territories to the eastern destinations via Chicago, Peoria, and St. Louis, Mo., are equalized. Accordingly, the differences, if any, in the proportional rates from Peoria and Chicago to the East are the same as those in the inbound rates to those points. Those differences are 2 cents from Trans-Mississippi River and Illinois-Iowa territories, 0.5 cent from northern Iowa, and nothing from the Northwest. On all of this inbound traffic the revenue received by the carrier or carriers west of Chicago or other junction with the eastern lines is the same as on the basis of the inbound rate to the junction, whether the shipment is accorded transit at some intermediate point or not. Thus on a shipment from Trans-Mississippi River territory accorded transit at Peoria and destined to Chicago, the through rate is the same as the revenue per 100 pounds received by the western carriers on the traffic destined to eastern points with which we are here concerned. On all of this traffic moving to the East defendants east of Chicago retain their full proportional rate of 30.5 cents, which leaves the Alton only the difference, if any, between that proportional rate and the outbound

rates from Peoria, ranging from 30.5 to 32.5 cents, depending on the territory of origin.

The Alton contends that just and reasonable divisions on this traffic would be those on the basis of the percentages [fol. 3-43] east and west of its junction with the eastern lines which are now reflected by the divisions of the contemporaneous first-class rates from Peoria to the eastern destinations. These work out as illustrated on page 597 of the former report. Defendants claim that they are entitled to retain their 30.5-cent proportional rate east of Chicago, whether the traffic comes from connections after receiving transit at Chicago or any point intermediate thereto, or in through continuous movement. The line-haul revenue which accrues to the western lines is now the same in all instances, and the Alton does not question the division of the through revenue east and west of Chicago on traffic accorded transit at that point, or on traffic in through continuous movement and which is not stopped for transit. It would thus make a distinction between the shipments accorded transit at Peoria and the other two classes of shipments. On the continuous movement, or on shipments accorded transit at Chicago, it would accord to the eastern lines their full proportional rate beyond Chicago, but on shipments accorded transit at Peoria it would divide the reshipping rate beyond Peoria so as to accord to the eastern lines less revenue and to the western lines greater revenue than they receive on the other two classes of shipments.

Defendants take the position that the participation of the Alton in much of this traffic, particularly from the Northwest, coming to it at Peoria short hauls all carriers handling the inbound traffic to that point, except the Minneapolis & St. Louis, which is the only carrier serving Peoria and the Northwest which does not also serve Chicago, that the Alton is not necessary to the movement of any of this traffic, but that if it desires to continue therein and is not satisfied with its present earnings it should look to the inbound carriers to Peoria and not the carriers east of Chicago. None of the inbound carriers to Peoria is a party to this proceeding. The Chicago, Rock Island & Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company also serve Peoria and have their own rails between Kansas City, Mo., and Chicago, as does the Alton.

The rate situation on this traffic and the divisions of the applicable rates are the same over the routes of these lines as they are over the route of the Alton, but only the latter is complaining.

The complaint of the Alton rests squarely upon its contention that on this traffic accorded transit at Peoria it must be regarded as an originating carrier because, it contends, the outbound shipments from Peoria on these pro- [fol. 3-44] portional rates are entirely separate and distinct from all prior transportation. To this contention we can not subscribe. In Central R. R. Co. v. United States, 257 U. S. 247, the Supreme Court recognized that transit privileges such as those here before us rest "upon the fiction that the incoming and outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination." In Grand Rapids & I. Ry. Co. v. United States, 212 Fed. 577, the court said that before the benefits of a transit shipment can be accorded some relation must in fact exist between the proposed outbound shipment and an inbound shipment. Practicable transit, especially on grain, could not exist without according to the shipper the right to bill his shipments to the transit point in the first place and subsequently to rebill them or their equivalent to a new and final destination, for the obvious reason that the final destination is not and can not be known at the time of initial shipment. Transit arrangements represent a departure from ordinary transportation service, under which shippers are accorded a more favorable basis of rates than would obtain if the inbound and outbound movements were treated as separate shipments. Montgomery Cotton Exchange v. L. & N. R. R. Co., 112 I. C. C. 325, 329. To treat the inbound and outbound shipments as separate and distinct is hopelessly repugnant to the principle of transit, which is that the same commodity, although generally in changed form, which moves to the transit point shall move therefrom to a new destination, and that the shipment from the point of origin through the transit point to destination is the same in principle as if the shipment had moved without transit. Columbia Malting Co. v. N. Y. C. R. R. Co., 53 I. C. C. 137. The underlying theory of transit is that of a continuous transportation from the point of origin to the

ultimate destination. Peoria Board of Trade v. A., T. & S. F. Ry. Co., 55 I. C. C. 42, 48, wherein, in dealing with these same proportional rates from Peoria, we said:

> The complainant's contention that the in-and-out shipments are wholly unrelated is not consistent with * * * complainant's right to use the reshipping rate outbound.

This must be the theory, for the only rates applicable on shipments accorded transit, as specifically provided in the governing tariff in respect of these shipments, are those in effect at the time of initial shipment. Larabee Flour Mills Corp. v. Atchison, T. & S. F. Ry. Co., 148 I. C. C. 5. Transit [fol. 3-45] arrangements such as those applicable on these shipments at Peoria have been frequently approved by us, and no question is raised here of their reasonableness. We do not conceive the foregoing principles governing transit to be in any essential respect in conflict with the decision of the Supreme Court in A., T. & S. F. Ry. v. United States, 279 U. S. 768, cited by the Alton.

In this case, therefore, we must give full effect to the transit provisions at Peoria under which these shipments move in our consideration of the lawfulness of the divisions received by the respective carriers parties to these outbound reshipping rates. Those provisions link together the outbound and inbound movements to and from Peoria so as to make them parts of a through movement from initial point of shipment through Peoria to final destination. Thus regarded, the proportional rates from Peoria are merely parts of the through rates, and the Alton is only an intermediate and not an originating carrier on this traffic.

If the claim of the Alton were sustained and these shipments accorded transit at Peoria were regarded as local shipments, it would inevitably follow that the transit provisions at Peoria would be of no effect on this traffic and the local and not the reshipping rates from that point would be applicable. In that event the issue with respect to the divisions of the reshipping rates would be moot. As stated, however, we can not agree with this claim. A similar contention made by Cairo interests in respect of grain and grain products from Illinois points to destinations in southern territory accorded transit at Cairo, Ill., was rejected

in Memphis Merchants Exchange v. I. C. C. R. R. Co., 43 I. C. C. 378.

Since the difference between the inbound rates and the outbound rates from and to Peoria on the one hand and Chicago on the other is in each instance the same, as it must be if the present equalization is to be maintained, to accord a division to the line handling the traffic from Peoria to Chicago greater than the difference between the rates to or from Peoria and Chicago would result, as previously indicated, in according to the carriers west of Chicago a greater proportion of the revenue on the through movement from point of initial shipment to final destination than such carriers now receive from the direct movement to Chicago. In other words, the Alton would receive greater revenue on a shipment from Kansas City, for example, to Chicago accorded transit at Peoria than it would on a like shipment moved direct to Chicago. Also the lines east of [fol. 3-46] Chicago would then be forced to accept less revenue on a shipment accorded transit at Peoria than on a shipment originating at the same point and accorded transit at Chicago or any intermediate point other than Peoria west of Chicago. The transportation services performed by defendants east of Chicago on all of such shipments are the same, and this record refers to no transportation reason for requiring defendants to accept less or different revenue on one than on the other. Neither does the record disclose any substantial differences in the line-haul services of the western carriers, including the Alton, on any of this traffic, but if there were such differences and those differences should warrant greater revenue to the Alton on shipments accorded transit at Peoria than it is now receiving, such increase in revenue to it, it would seem, should come from the portion of the through rate accruing to the western lines and not from the portion now retained by the lines east of Chicago.

On most of the traffic here considered the route employed by the Alton is circuitous. The proportional rates from Peoria apply in connection with the Alton, not only via Chicago, Joliet, and Dwight, but also via junctions south of Dwight, such as Chenoa, Ill., to which the haul of the Alton is considerably shorter than to Dwight, and it is not necessary for this traffic after it reaches the Alton to

move via its northern junctions. All of this traffic may now move through Ashland and Springfield, Ill., in connection with the Baltimore & Ohio. Prior to the present rate equalization through the various gateways, by rates breaking thereon, the joint rates then in effect from the Northwest to eastern destinations did not apply via Peoria on traffic through Chicago. On grain and by-products from the Northwest the proportional rates from Peoria are now restricted so as not to apply via Chicago, and the same restriction could readily be made on grain products. These facts are important in our consideration of "the importance to the public of the transportation services" of the Alton for the performance of which it is here seeking increased divisions, an element which section 15 (6) of the act requires us to consider. No shipper or community has expressed any concern over the continuance of those transportation services by the Alton, and this record affords no support for a finding that they are important to the public.

The other matters which section 15 (6) requires us to consider in our determination of divisions of joint rates, [fol. 3-47] facts with respect to which are of record and which we have considered in reaching our conclusions herein, are sufficiently recited in the original report.

We find that the assailed divisions of the reshipping or proportional rates have not been shown to be unjust, unreasonable, or otherwise unlawful as alleged, and the finding in the original report in that respect is reversed. The finding of division 5 in respect of the assailed divisions of the non-transit or local rates is affirmed. A modified order will issue.

EASTMAN, Commissioner, dissenting:

Much of the discussion in the majority report seems to me beside the mark. As I understand it, the Alton participates with its eastern connections in certain joint rates from Peoria on transit grain and grain products. It is dissatisfied with the divisions which it receives out of these joint rates, and asks us to fix just, reasonable, and equitable divisions under section 15 (6). The joint rates in question are known as proportional or reshipping rates, and therefore are applicable to a part of what is, construc-

tively at least, a through movement from some origin point west of Peoria to an eastern destination. However, the carriers have not seen fit to establish joint rates covering the entire through movement, and the through rates are combinations of separate factors west and east of Peoria.

The Alton and its eastern connections having elected to establish and participate in separate joint rates east of Peoria, the Alton is entitled to just, reasonable, and equitable divisions of those joint rates. The majority suggest that if it desires more money for its part of the haul, it should get it out of its western and not out of its eastern connections. But the former have not seen fit to participate with the Alton in joint rates, whereas the latter have elected to do so. Under the circumstances I am at a loss to know how the Alton could increase its share of the joint rates with its eastern connections at the expense of its western connections. And if this impossible thing were possible, we are met with the further difficulty that it is not an issue in this case.

The divisions which the Alton receives out of the joint rates in issue vary from zero to 2 cents for hauls ranging from 82 to 155 miles. The majority finds, in effect, that these divisions are just, reasonable, and equitable. It has [fol. 3-48] been indicated by the Supreme Court that any divisions which we prescribe must be "adequate to avoid a confiscatory result". Dayton-Goose Creek Ry. Co. v. United States, 263 U. S. 456, 477; U. S. v. Abilene & So. Ry. Co., 265 U. S. 274, 285. I realize that there are difficulties with this doctrine, particularly if we are called upon to divide a low rate established by the carriers to meet competition and designed to yield only a little more than "out-of-pocket" cost. But it is unnecessary to pursue these difficulties here, for surely the confiscatory character of a zero division is not open to argument.

The theory of the majority seems to be that these particular joint rates involve a wasteful and unnecessary haul, that the Alton is responsible for this waste, and that the revenue of its eastern connections ought not to be sacrificed because the Alton wishes to haul grain out of line. The remedy for the eastern connections under such circumstances, however, is clearly to refrain from participating

with the Alton in such joint rates. If they participate, they must under the law, as I see it, assume the consequent burden and accord the Alton divisions consistent, to some considerable extent at least, with the transportation service which it performs in connection with those joint rates.

In my judgment the findings of the prior report should be affirmed.

I am authorized to say that Chairman Brainerd and Commissioner Farrell join in this dissent.

LEWIS, Commissioner, dissenting in part:

I dissent from so much of the majority report as prescribes on bases different from those prescribed by division 5, 169 I. C. C. 594, divisions of the proportional joint rates on grain which receives a transit service at Peoria or Pekin. I cannot agree that, so long as those rates are maintained with the concurrence of the lines east of Chicago, just, reasonable, and equitable divisions are those which in some instances require the Alton to haul the traffic 155 miles without compensation.

[fol. 3-49] Order

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE, IN WASHINGTON, D. C., ON THE 7TH DAY OF DECEMBER, A. D. 1931

No. 22487

WILLIAM W. WHEELOCK and WILLIAM G. BIERD, as Receivers of Railways and Property of Chicago & Alton Railroad Company,

v.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY; The Ann Arbor Railroad Company; Arcade and Attica Railroad Corporation; Arcadia & Betsey River Railway Company; Aroostook Valley Railroad Company; Atlantic City Railroad Company; Atlantic Coast Line Railroad Company; Baltimore and Carolina Steamship Company of Baltimore City; Baltimore and Eastern Railroad Company; The Baltimore and Ohio Railroad Company; The Baltimore and Ohio Chicago Terminal Railroad Com-

pany; Baltimore, Chesapeake & Atlantic Railway Company; Bangor and Aroostook Railroad Company; Bath and Hammondsport Railroad Company; Bellefonte Central Railroad Company; The Belt Railway Company of Chicago; Bessemer and Lake Erie Railroad Company; Big Sandy and Cumberland Railroad Company; Black Mountain Railway Company; Blue Ridge Railway Com-Company; Boston and Albany Railroad (The New York Central Railroad Company, Lessee); Boston and Maine Railroad; Boyne City, Gaylord and Alpena Railroad Company; Buffalo & Susquehanna Railroad Corp.; Buffalo, Rochester and Pittsburgh Railway Company; Bush Terminal Railroad Company; Cambria and Indiana Railroad Company; Canada Steamship Lines (Limited); Canadian National Railways; Canadian Pacific Railway Company; Catskill Evening Line (Inc.); Central-Hudson Steamboat Company (Geo. Hutchinson and Herbert R. Odell, Receivers in Equity); The Central Railroad Company of New Jersey; Central Vermont Railway Company (Geo. A. Gaston and J. W. Redmond, Receivers); The Chesapeake and Ohio Railway Company; Chesapeake Beach Railway Company; Chesapeake Western Railway; Chestnut Ridge Railway Company; Chicago and Erie Railroad Company; [fol. 3-50] Chicago, Attica & Southern Railroad Company; Chicago, Indianapolis and Louisville Railway Company; Chicago Junction Railway (The Chicago River and Indiana Railroad Company, Lessee); Chicago, Kalamazoo and Saginaw Railway Company; The Cincinnati, New Orleans and Texas Pacific Railway Company; The Cincinnati Northern Railroad Company; Clarion River Railway Company (Tionesta Valley Railway Company, Lessee); The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Carolina, Clinchfield and Ohio Railway, Carolina, Clinchfield and Ohio Railway of So. Carolina, and Clinchfield Northern Railway of Kentucky (Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, Lessees); The Baltimore and Virginia Steamboat Company; The Cooperstown and Charlotte Valley Railroad Company; Cornwall Railroad Company; Coudersport and Port Allegany Railroad; Cumberland and Pennsylvania Railroad Company; Curtis-Logsdon Transportation Company; The Dansville and Mount Morris Railroad Company; Dayton and Union

Railroad Company; The Delaware and Hudson Company; Delaware & Northern Railroad Company (Andrew M. Moreland and James J. Welch, Receivers); The Delaware, Lackawanna and Western Railroad Company; The Detroit and Huron Railway Company; Detroit and Mackinac Railway Company; The Detroit and Toledo Shore Line Railroad Company; Detroit, Cairo and Sandusky Railway Company; Detroit, Toledo and Ironton Railroad Company; East Jersey Railroad and Terminal Company; East Jordon & Southern Railroad Company; Elgin, Joliet and Eastern Railway Company; Emmitsburg Railroad Company; Erie & Michigan Railway & Navigation Co.; Erie Railroad Company; Evansville, Indianapolis & Terre Haute Railway Company; Fonda, Johnstown and Gloversville Railroad Company; Frankfort and Cincinnati Railroad Company; Genesee and Wyoming Railroad Company; Grafton and Upton Railroad Company; Grand Trunk Railway System (Lines in the United States East of the West Bank of the Detroit and St. Clair Rivers), comprising the following carriers: Canadian National Railway Company, The Champlain and St. Lawrence Railroad Company (Canadian National Railway Company, Lessee), The United States and Canada Rail-Road Company (Canadian National Railway Company, Lessee); Grand Trunk Railway System (Lines West of Detroit and St. Clair Rivers), comprising the following [fol. 3-51] carriers: The Chicago, Detroit and Canada Grand Trunk Junction Railroad Company (Canadian National Railway Company, Lessee), Cincinnati, Saginaw and Mackinaw Railroad Company (Canadian National Railway Company, Lessee), Detroit, Grand Haven and Milwaukee Railway Company, Grand Trunk Western Railway Company, Grand Trunk-Milwaukee Car Ferry Company, The Michigan Air Line Railway, Toledo, Saginaw and Muskegon Railway Company; Greenwich & Johnsonville Railway Company; The Hagerstown and Frederick Railway Company; The Hartford and New York Transportation Company; Hoboken Manufacturers Railroad Company; The Hocking Valley Railway Company; Hulett Transportation Company, a partnership; Indiana Harbor Belt Railroad Company; Interstate Railroad Company; The Ironton Railroad Company (Lehigh Valley Railroad Company, Reading Company, Lessees);

Kane and Elk Railroad Company; Lackawanna and Wyoming Valley Railroad Company; Lake Erie, Franklin & Clarion Railroad Company; The Lehigh and Hudson River Railway Company; Lehigh and New England Railroad Company; Lehigh Valley Railroad Company; The Lima & Defiance Railroad Company; The Long Island Railroad Company; The Lorain & West Virginia Railway Company; Louisville and Nashville Railroad Company; Louisville, New Albany & Corydon Railroad Company; The Lowville and Beaver River Railroad Company; Maine Central Railroad Company; Maine Coast & Canada Steamship Co.; Manistee and Northeastern Railroad Company; Marion & Rye Valley Railway Company; Marquette and Bessemer Dock & Navigation Company; Maryland and Pennsylvania Railroad Company; The Michigan Central Railroad Company; Michigan Railroad Company (John F. Collins, Receiver); Michigan Electric Railway Company (John F. Collins, Receiver); The Middlesex Transportation Company; Middletown and Unionville Railroad Company; Montour Railroad Company; Montpelier and Wells River Railroad; Morristown & Erie Railroad Company; Moshassuck Valley Railroad Company; Mount Jewett, Kinzua and Riterville Railroad Company; The Narragansett Pier Railroad Company; The Nashville, Chattanooga & St. Louis Railway; The Newark Express & Transportation Company; The New England Steamship Company; The New Jersey and New York Railroad Company; New York and Hastings Steam-[fol. 3-52] Boat Company; The New York and Long Branch Railroad Company; New York and New Jersey Steamboat Company; New York and Pennsylvania Railway Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The New York, New Haven and Hartford Railroad Company; New York, Ontario and Western Railway Company; New York, Susquehanna and Western Railroad Company; New York, Westchester & Boston Railway Company; Norfolk and Washington, D. C., Steamboat Company; Norfolk and Western Railway Company; Northampton and Bath Railroad Company; Norfolk Southern Railroad Company; The North and East River Steamboat Company; The Northern Ohio Railway Company; Norwood & St. Lawrence Railroad Company; Pa-

ducah & Illinois Railroad Company; Pennsylvania and Atlantic Railroad Company (South of Hightstown, N. J., to Pemberton, N. J., inclusive, The Union Transportation Company, Lessee); The Pennsylvania-Ontario Transportation Company (Car Ferry Route); The Pennsylvania Railroad Company; Pere Marquette Railway Company; The Pittsburgh and Lake Erie Railroad Company; The Pittsburgh & Shawmut Railroad Company; Pittsburgh & Susquehanna Railroad Company; The Pittsburgh & West Virginia Railway Company; The Pittsburgh, Lisbon & Western Railroad Company; The Pittsburgh, Shawmut & Northern Railroad Company (John D. Dickson, Receiver); The Pontiac, Oxford and Northern Railroad Company; Port Chester Transportation Company; Port Huron and Detroit Railroad Company; Prattsburgh Railway Corp.; Quebec Central Railway Company; The Quebec, Montreal and Southern Railway Company; The Potomac Edison Company; Rahway Valley Company (Rahway Valley Company, Lessee); The Rapid Railroad Company (Security Trust Company, Receiver); Raquette Lake Railway Company; Raritan River Railroad Company; Reading Company; Reynoldsville and Falls Creek Railroad Company; Richmond, Fredericksburg and Potomac Railroad Company; Rutland Railroad Company; The St. Johnsbury & Lake Champlain Railroad Company; The Saugerties and New York Steamboat Company; Schoharie Valley Railway Company; Seaboard Air Line Railway Company; Seaport Navigation Company; Sheffield and Tionesta Railway Company; South Brooklyn Railway Company; Southern Railway Company; Southern Railway Company (St. Louis-Louisville Division); South Manchester Railroad [fol. 3-53] Company; Starin-New Haven Line; The Staten Island Rapid Transit Railway Company; The Stewartstown Railroad Company; Suncook Valley Railroad; Susquehanna and New York Railroad Company; Tionesta Valley Railway Company; The Toledo & Indiana Railroad Company; Toledo and Western Railway Company; Toledo, Peoria & Western Railroad; The Toledo Terminal Railroad Company; The Toronto, Hamilton and Buffalo Railway Company; The Tuckerton Railroad Company; Unadilla Valley Railway Company; United Electric Railways Company; The Valley Railroad Com-

pany (Virginia); Virginia Central Railway; Virginia-Southern Railroad Company (W. H. Sitterding, Receiver); The Virginian Railway Company; Wabash Railway Company; Washington and Old Dominion Railway; Western Allegany Railroad Company; Western Maryland Railway Company; The Westfield Railroad Company; West Jersey and Seashore Railroad Company; West Ports Steamship Line; West Shore Railroad (The New York Central Railroad Company, Lessee); West Virginia Midland Railway Company; West Virginia Northern Railroad Company, Wharton and Northern Railroad Company; The Wheeling and Lake Erie Railway Company; Wildwood and Delaware Bay Short Line Railroad Company; The Wilkes-Barre and Eastern Railroad Company; The Wilkes-Barre and Hazelton Railway Company; Williamsport & North Branch Railway Company; The Winfield Railroad Company; The Winona Railroad Company; Wisconsin & Michigan Railroad Company; Wisconsin & Michigan Transportation Company; Wood River Branch Railroad Company; Yale Short Line Railroad Company; and The Youngstown & Ohio River Railroad Company.

This case having been reheard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report on rehearing containing its findings of fact and conclusions thereon, which said report, together with the original report and order herein, 169 I. C. C. 594, is hereby referred to and made a part hereof; and the commission having found in said report on rehearing, (1) that just, reasonable, and equitable divisions to be received, respectively, by complainants herein and the defendant carriers east of Chicago, Joliet, or Dwight, Ill., out [fols. 3-54 & 4] of the joint nontransit rates on grain, grain products, and grain by-products, in carloads, from Peoria and Pekin, Ill., via Chicago, Joliet, or Dwight, to destinations in eastern trunk-line and New England territories, east of Buffalo, N. Y., over the lines of complainants to Chicago, Joliet, or Dwight, will be the specific or arbitrary over the Chicago reshipping rate to complainants and the reshipping rate from Chicago to destination to the carriers defendant east of Chicago; and (2) that the present divi-

sions of joint reshipping or proportional rates on grain, grain products, and grain by-products, in carloads, from Peoria and Pekin over the lines of complainants to Chicago, Joliet, or Dwight, destined to points in eastern trunk-line and New England territories east of Buffalo, are not unjust, unreasonable, or otherwise unlawful as alleged by complainants:

It is ordered that the aforementioned original order of November 28, 1930, be, and it is hereby, vacated and set aside.

It is further ordered that the above-named defendants, according as they participate in the transportation, be, and they are hereby notified and required to cease and desist, on or before January 16, 1932, and thereafter to abstain from demanding, collecting, or receiving divisions of the joint nontransit rates specified in the preceding paragraph which do not allow said complainants the divisions found in said reports to be just, reasonable, and equitable.

And it is further ordered that this order shall continue in force until the further order of the commission.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 5] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF UNITED STATES OF AMERICA—Filed Feb. 17, 1932

First Defense

United States of America, one of the defendants in the above-entitled cause, for its First Defense to the petition filed herein against it says:

A. The District Court is without jurisdiction to entertain the petition: The report and order of the Interstate Commerce Commission in William W. Wheelock, et al. v. Akron, Canton & Youngstown Railway Company, et al., rendered December 7, 1931, annexed as Appendix C to the petition, show that the Commission has issued no "order" and has made no requirement or command whatever of petitioner

or any one else with respect to the divisions of the joint through reshipping or proportional rates described in the [fol. 6] petition, and that in so far as it affects the divisions of said rates the Commission's action with respect thereto is purely negative; that is to say, as set forth in paragraphs (2) and (6) of the petition, the complaint to the Commission alleged that petitioner's divisions of joint through rates applicable to the transportation of both transit and nontransit grain and grain products were unjust, unreasonable and otherwise unlawful; that with respect to the divisions of the rates applicable to the nontransit traffic, described as local rates in paragraph (2) of the petition, the Commission found, held and ordered that said divisions were unreasonable, and prescribed reasonable and non-prejudicial divisions of said nontransit rates; and thereupon entered its order as follows:

This case having been reheard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report on rehearing containing its findings of fact and conclusions thereon, which said report, together with the original report and order herein, 169 I. C. C. 594, is hereby referred to and made a part hereof; and the commission having found in said report on rehearing, (1) that just, reasonable, and equitable divisions to be received, respectively, by complainants herein and the defendant carriers east of Chicago, Joliet, or Dwight, Ill., out of the joint nontransit rates on grain, grain products, and grain by-products, in carloads, from Peoria and Pekin, Ill., via Chicago, Joliet, or Dwight, to destinations in eastern trunk-line and New England territories, east of Buffalo, N. Y., over the lines of complainants to Chicago, Joliet, or Dwight, will be the specific or arbitrary over the Chicago reshipping rate to complainants and the reshipping rate from Chicago to destination to the carriers defendant east of Chicago; and (2) that the present divisions of joint reshipping or proportional rates on grain, grain products, and grain by-products, in carloads, from Peoria and Pekin [fol. 7] over the lines of complainants to Chicago, Joliet, or Dwight, destined to points in eastern trunk-line and New England territories east of Buffalo, are not unjust, unreasonable, or otherwise unlawful as alleged by complainants.

It is ordered that the aforementioned original order of

November 28, 1930, be, and it is hereby, vacated and set aside.

It is further ordered that the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before January 16, 1932, and thereafter to abstain from demanding, collecting, or receiving divisions of the joint nontransit rates specified in the preceding paragraph which do not allow said complainants the divisions found in said reports to be just, reasonable, and equitable.

And it is further ordered that this order shall continue in force until the further order of the commission.

That as appears in the face of the order just quoted the only command or requirement thereby made is with respect to the divisions of said nontransit rates, which said portion of the order is not attacked by the petition; and that said order requires petitioner neither to do nor to refrain from doing anything with respect of divisions of said joint reshipping or proportional rates, and makes no requirement whatever with respect thereto. It is, therefore, not an "order" within the meaning of Commerce Court Act of June 18, 1910 (36 Stat. 539) and Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219).

B. The District Court is without power to grant the relief prayed, as no decree which this Court has power to issue can correct or change the Commission's conclusions as to the unreasonableness of the divisions of said joint reshipping rates; nor has the Court power to compel the Commission to change its administrative finding of fact that said [fol. 8] divisions had not been shown to be unreasonable or otherwise unlawful.

C. The petition presents no basis for equitable relief. The portion of the alleged order complained of makes no command or requirement whatever of petitioner or any one else with respect to the divisions of said joint reshipping rates, nor is there anything in said order which the United States or the Commission is threatening to or could enforce against petitioner, hence there is nothing to which the Court's injunctive decree could attach, nor anything which is susceptible of annulment, suspension or enjoinment.

Wherefore United States moves to dismiss the petition and prays that an appropriate order may be entered.

Second Defense

United States of America, for its Second Defense to the petition filed herein against it, answers and says:

I

United States admits for the purposes of this suit the allegations contained in the opening paragraph and in paragraphs (1), (2), (3), (4), (5), (6), (7) and (8) of the petition, with these exceptions:

(a) United States denies the conclusion at the end of said opening paragraph, namely, that the Commission's said order "approved, authorized and required" the divisions of the joint reshipping rates therein mentioned, and [fol. 9] alleges that with respect to said divisions the Commission's order makes no authorization or requirement whatever, but merely repeats the administrative finding of fact recited in the Commission's report that the existing divisions of said rates "have not been shown to be unjust, unreasonable, or otherwise unlawful as alleged."

(b) United States denies that the allegations contained in the last two sentences of said paragraph (5), namely, that the railroad defendants herein established existing divisions without the consent of and over the objection of the Receivers of petitioner's property in 1928 and 1929, and without the order or authorization of any court or commission, and that the railroad defendants herein were able to enforce said reduced divisions, are either competent, relevant or material in determining whether the Commission's said order is lawful.

(c) United States further denies the allegation in said paragraph (8) that with respect to the existing divisions of said joint reshipping or proportional rates the Commission "approved, authorized and required them for future application and enforcement by the Railroad Defendants herein"; and, for a full, complete and accurate statement of the Commission's findings and requirements in said report and order, United States respectfully refers the Court to said Appendix C to the petition, and particularly the opening paragraph of said order, the only pertinent portion of which neither approves, authorizes or requires the existing

divisions for future application or enforcement, but merely recites the Commission's administrative finding of fact as follows:

[fol. 10] that the present divisions of joint reshipping or proportional rates on grain, grain products, and grain by-products, in carloads, from Peoria and Pekin over the lines of complainants to Chicago, Joliet, or Dwight, destined to points in eastern trunk-line and New England territories east of Buffalo, are not unjust, unreasonable, or otherwise unlawful as alleged by complainants.

II

United States for answer to paragraph (9) of the petition admits that the joint reshipping or proportional rates referred to therein are now on file with the Commission pursuant to law and are in full force and effect; admits that so long as petitioner participates as it now does in the publishing and filing of said joint rates it may be required by law to perform the transportation services proffered at and for the rates therein published; admits, for the purposes of this suit, that the compensation petitioner receives for the particular services described in said paragraph (9) is the existing divisions of said joint reshippng or proportonal rates in the amounts mentioned in said paragraph; but United States denies that the Commission's said order requires petitioner to participate in the publishing and filing of said joint rates or to perform any transportation service thereunder, and further denies that said order requires the railroads to establish said divisions, and denies also that the existing divisions of said joint rates were established or now are maintained pursuant to, under authority or by virtue of the Commission's said order, and says, to the contrary, that, as shown and alleged in paragraphs (5) and (12) of the petition, said divisions were established voluntarily by the railroads participating in [fol. 11] said joint reshipping rates in 1928 and 1929, and were in existence some two years before the Commission entered its said order of December 7, 1931.

III

United States denies the matters, things and conclusions alleged in paragraph (10) of the petition, and upon the trial

of this cause United States will demand of petitioner strict proof of the matters and things in said paragraph (10) alleged.

IV

United States denies all the matters, things and conclusions alleged in paragraph (11) of the petition, and denies all the suggestions, inferences and conclusions thereby sought to be created.

Further and affirmatively answering said paragraph (11) United States alleges that, as shown by the Commission's report (Appendix C to the petition), in discharging the duty imposed upon it by Section 15 (6) of the Interstate Commerce Act, requiring the Commission, in determining just and reasonable divisions, to give consideration, among other things, to "the importance to the public of the transportation services," the Commission did, as so required by statute consider the importance to the public of petitioner's participation in the transportation involved, and alleges further that petitioner's engagement and participation in the transportation of the grain traffic described was a matter which the Commission was required by said Section 15 (6) of the Act to consider in determining whether peti- [fol. 12] tioner's participation in said traffic was of "importance to the public"; and United States further alleges that the evidence before the Commission amply supports and justifies the statement made in said report that said evidence was insufficient to justify a finding that petitioner's continued engagement in transportation of said transit grain traffic was important to the public.

V

Answering paragraph (12) of the petition United States admits that Section 208, Transportation Act, 1920, contains the language quoted in said paragraph (12), but denies that the allegation, even if true, that the divisions of said joint reshipping rates were changed by the railroad defendants herein contrary to or in violation of said Section 208, is either relevant, competent or material to any issue which is or may be properly raised in this suit brought under Urgent Deficiencies Act; denies that this Court, convened under said Urgent Deficiencies Act, has jurisdiction to enjoint or to consider in this proceeding an alleged violation

of said Section 208; denies that the Commission's said order either approved, authorized or required the establishment or maintenance of the divisions of said joint reshipping rates, and alleges that said order made no requirement whatever with respect to said divisions, but merely found that they had not been shown to be unreasonable or otherwise unlawful in violation of the Interstate Commerce Act; denies that said divisions are now enforced and applied by the railroad defendants herein pursuant to or under authority of said order; denies that the Commission's finding that said divisions were not unreasonable is susceptible of enforcement; and denies further that said order will or can have the effect of confiscating petitioner's [fol. 13] property as alleged in said paragraph (12) or otherwise, or that it will infringe or affect any legal right whatsoever of petitioner.

VI

United States, for answer to paragraph (13) of the petition, denies that petitioner will sustain irreparable or other legal damage by reason of any of the matters, things or conclusions set forth and alleged in said paragraph; denies that said order authorizes or requires the maintenance or application of said divisions and denies that the railroad defendants herein are enforcing said divisions against petitioner "under the authority of said report and order"; denies that petitioner's property is being or will be confiscated by virtue of any requirement or command or any effect whatever of said order, and denies that said order makes any requirement or command whatever with respect to either said divisions or said joint reshipping rates, and alleges, therefore, that said order will not and could not operate to prevent petitioner from exercising its alleged lawful right to participate in said joint reshipping rates and in the transportation of transit traffic thereunder.

Further and affirmatively answering said paragraph (13), United States alleges that, in so far as said order or any requirement thereof is concerned, petitioner is at liberty, precisely as it was before said order was entered on December 7, 1931, to make, by mutual agreement with the connecting carriers which participate in the publishing and filing of said joint reshipping rates, any desired change in

[fol. 14] said divisions or the amount thereof, and that nothing in said order or in the Act under which the Commission functioned in making and issuing it, will prevent such change.

VII

Further answering the petition, United States denies that said order is either unreasonable, arbitrary, unlawful or void, and denies that in making and issuing it the Commission acted beyond the authority duly reposed in it by the Interstate Commerce Act, and denies that the Commission acted without adequate and ample evidence to sustain the findings and conclusion set forth in its said report.

VIII

Except as expressly admitted herein, United States denies each and every fact, matter and thing set forth and alleged in the petition and in each paragraph thereof.

Wherefore, having fully answered the petition, United States prays that the relief therein sought be denied and the petition dismissed with costs to the petitioner, and that it have such other and further orders, decrees, or relief as may be just and proper.

George E. Q. Johnson, United State Attorney. John Lord O'Brian, Assistant to the Attorney General. Elmer B. Collins, Special Assistant to the Attorney General.

[fols. 15 & 16] *Duly sworn to by Elmer B. Collins. Jurat omitted in printing.*

[fol. 17] In United States District Court

[Title omitted]

Answer of Interstate Commerce Commission—Filed Feb. 17, 1932

The Interstate Commerce Commission, defendant in the above-entitled suit, hereinafter called the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the

many errors and insufficiencies in the petitioner's petition contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering the opening paragraph and paragraph (1) of the petition, the Commission admits for the purposes of this suit that the allegations therein contained are true, except that it denies that its order either approved, authorized, or required the joint rate divisions complained of in said petition, to-wit, the divisions of joint reshipping or proportional transit rates applicable from Peoria and Pekin, Ill., on grain, grain products and grain by-products, originating in [fol. 18] the territories described in the tariff publishing said rates as Trans-Mississippi River territory, Northern Iowa territory, Illinois-Iowa territory, and Northwestern territory, to certain points east of Buffalo, N. Y., and denies that the Urgent Deficiencies Act, 38 Stat. 219 (U. S. Code, Title 28, Sec. 41 (28) and Secs. 43 to 48, as revised in Supp. IV), authorizes a suit either against the United States or the Commission, or otherwise, to enjoin, set aside, annul or suspend an order of the Commission of the character referred to in said petition, in which no requirement whatsoever respecting the joint rate divisions complained of in said petition is made, which requires neither the petitioner nor any of the defendants named in said petition to do or to abstain from doing any act in so far as the joint rate divisions complained of in said petition are concerned, and which merely denied to the complainants in the Commission proceeding the affirmative administrative relief sought in said proceeding.

II

Answering paragraph (2) of the petition, the Commission admits for the purposes of this suit that the allegations therein contained are true to the extent that the facts are stated, but the Commission alleges that said allegations do not contain a full and complete description either of the rules, regulations, and conditions governing the application of the rates referred to therein or of the transportation service performed thereunder.

III

Answering paragraph (3) of the petition, the Commission admits for the purposes of this suit that the allegations therein contained are true to the extent that the facts are stated, but the Commission alleges that said allegations do not contain a full, accurate and complete description of either the former participation by The Chicago & Alton [fol. 19] Railroad Company or the receivers thereof (hereinafter collectively referred to as the Chicago & Alton R. R.) or the present participation by the petitioner, in the transportation of grain, grain products, and grain by-products to which the aforesaid joint reshipping or proportional transit rates apply in part, namely, that part of the through transportation performed between Peoria or Pekin, Ill., and the points of destination.

IV

Answering paragraph (4) of the petition, the Commission admits for the purposes of this suit that the allegations therein contained are true.

V

Answering paragraph (5) of the petition, the Commission neither denies nor admits the allegations contained therein which relate the history of changes made in the divisions referred to, for the reason that such allegations are irrelevant and immaterial. The Commission alleges in this connection that the divisions accruing to the Chicago & Alton R. R. at the time of the commencement of the proceeding before the Commission, out of the joint reshipping or proportional transit rates from Peoria or Pekin to destinations east of Buffalo, on traffic transported by the Chicago & Alton R. R. from Peoria or Pekin to Dwight, Joliet, or Chicago, Ill., and there delivered to an eastern connection, were 2 cents per 100 pounds when the applicable rate was 32.5 cents per 100 pounds, 0.5 cent per 100 pounds when the applicable rate was 31 cents per 100 pounds, and nothing when the applicable rate was 30.5 cents per 100 pounds, but the Commission further alleges that these were not then and are not now the divisions accruing to the Chicago & Alton R. R. or the petitioner out of the local non-transit rates

[fol. 20] from Peoria or Pekin. The Commission denies the allegation contained in the last sentence of paragraph (5) of the petition.

VI

Answering paragraph (6) of the petition, the Commission admits for the purposes of this suit that the allegations therein contained are true.

VII

Answering paragraph (7) of the petition, the Commission admits for the purposes of this suit that the allegations therein contained are true.

VIII

Answering paragraph (8) of the petition, the Commission admits for the purposes of this suit that the allegations therein contained are true, except that the Commission denies that it approved, authorized, and required for future application and enforcement by the railroad defendants herein the divisions accruing to the Chicago & Alton R. R. out of the joint reshipping or proportional transit rates referred to.

Further answering paragraphs (6), (7), and (8) of the petition, the Commission admits and alleges that Division 5 of the Commission made the report and order dated November 28, 1930, referred to in paragraph (7); that said report and order were made in a proceeding then pending before Division 5 of the Commission in which William W. Wheelock and William G. Bierd, as Receivers of the railways and property of The Chicago and Alton Railroad Company, were complainants and the railroad companies named as defendants in the petition herein, as well as other railroad common carriers subject to the Interstate Commerce Act, were defendants; that in said proceeding (numbered on the Commission's docket as 22487) the questions in issue were [fol. 21] whether the divisions (1) of joint non-transit rates applying locally from Peoria and Pekin, Illinois (which two places are hereinafter referred to collectively as Peoria) on shipments of gain, grain products, and grain by-products which originate at Peoria, or which, for any other reason, are not entitled to the lower transit rates herein-

after mentioned, (2) of joint reshipping or proportional, transit rates (hereinafter referred to as transit rates) from Peoria) on shipments of grain, grain products, and grain by-products originating in the territories described in the tariff publishing said transit rates as Trans-Mississippi, Northern Iowa, Illinois-Iowa, and Northwestern territories, to certain destinations east of Buffalo, New York, were unjust, unreasonable, inequitable, or unduly preferential or prejudicial, in violation of paragraph (4) of section 1 of the Interstate Commerce Act; that in said proceeding the complainants therein were accorded the full hearing provided for in said Act; that in said hearing a large volume of testimony and other evidence bearing upon the matters covered by said report was submitted to Division 5 of the Commission for consideration, including testimony and other evidence submitted on behalf of the complainants by their counsel; that after the filing of briefs, the issuance of a proposed report by the Commission's examiner, and the filing of exceptions to said proposed report by complainants and defendants, Division 5 of the Commission determined said matters, and made and issued a report, dated November 28, 1930, entitled William W. Wheelock and William G. Bierd, as receivers of Railways and Property of Chicago & Alton Railroad Company v. Akron, Canton & Youngstown Railway Company et al., 169 I. C. C. 594, and at the same time issued its order, also dated November 28, 1930, a copy of which report and order are incorporated in [fol. 22] the petition, pages 22 to 39, inclusive, as Appendix B; that Division 5 of the Commission found in said report that the divisions accorded the Chicago & Alton R. R. of both the non-transit and transit rates in question were unjust, unreasonable, and inequitable, and unduly prejudicial to the Chicago & Alton R. R. and unduly preferential of its connections having rails east of Chicago, Joliet and Dwight, and by its order required that for the future, effective March 10, 1931, the just, reasonable and equitable divisions to be received, respectively, by the Chicago & Alton R. R. and the defendant carriers east of Chicago, Joliet, or Dwight, Ill., out of the transit rates in question would be 20 per cent to the Chicago & Alton R. R. and the remainder to the carriers east of Chicago, Joliet, or Dwight, and out of the non-transit rates in question would be the

specific or arbitrary over the Chicago reshipping rate to the Chicago & Alton R. R. and the reshipping rate from Chicago to destination to the carriers defendant east of Chicago.

The Commission further alleges that thereafter, on February 21, 1931, the defendants in said proceeding filed with the Commission a petition dated February 20, 1931, for the postponement of the effective date of said order of Division 5 dated November 28, 1930, and for rehearing and reargument and reconsideration by the entire Commission; that by order dated February 24, 1931, Division 5 of the Commission postponed the effective date of its order of November 28, 1930, from March 10, 1931, to April 10, 1931; that by order dated March 9, 1931, the Commission upon consideration of defendants' petition for postponement of [fol. 23] order and for rehearing, reargument and reconsideration by the entire Commission, reopened said proceeding for rehearing and indefinitely postponed the effective date of Division 5's order of November 28, 1930, as modified by its said order of February 24, 1931.

The Commission further alleges that rehearing was held and additional evidence submitted, and, after the filing of briefs on rehearing, the issuance by the Commission's examiner of a proposed report on rehearing, the filing of exceptions to said proposed report by complainants and reply thereto by defendants, the Commission, on December 7, 1931, issued its report on rehearing, entitled William W. Wheelock and William G. Bierd, as Receivers of Railways and Property of Chicago & Alton Railroad Company v. Akron, Canton & Youngstown Railway Company et al., 179 I. C. C. 517, and at the same time issued its order, also dated December 7, 1931. A copy of said report and order is incorporated in the petition, pages 40 to 54, inclusive, as Appendix C. The Commission affirmed the finding of Division 5 that the divisions accorded the Chicago & Alton R. R. of the non-transit rates were unjust, unreasonable, and inequitable, but found that the divisions of the transit rates had "not been shown to be unjust, unreasonable, or otherwise unlawful as alleged," and reversed the finding of Division 5 in respect of said divisions of transit rates.

The Commission further alleges that its order of December 7, 1931, vacated and set aside the order of Division 5

dated November 28, 1930, and required the defendants "to cease and desist, on or before January 16, 1932, and there-
[fol. 24] after to abstain from demanding, collecting or receiving divisions of the joint non-transit rates specified in the preceding paragraph which do not allow said complainants the divisions found in said reports to be just, reasonable and equitable." Said order contains no other requirement whatever.

The Commission further alleges that said report and order of December 7, 1931, included the Commission's findings of fact, decision and conclusions, and that upon the evidence aforesaid and as shown in and by said report and by the earlier report of Division 5, dated November 28, 1930, the Commission made the findings and stated the conclusions upon which its order was and is based; and the Commission refers the court to the text of said reports and orders of November 28, 1930, and December 7, 1931, which are hereby referred to and made a part hereof, for full, complete, and accurate information concerning the contents of said reports and orders and for a full description of the proceedings before Division 5 and before the Commission upon which said reports and orders were and are based.

The Commission further alleges that the findings and conclusions in said report of December 7, 1931, were and are, and that each of them was and is fully supported and justified by the evidence submitted to the Commission in said proceeding as aforesaid.

The Commission further alleges that in making said report it considered and weighed carefully in the light of its own knowledge and experience each fact, circumstance and condition called to its attention on behalf of the complainants by their counsel, including matters covered by the allegations of the petition herein.

[fol. 25] The Commission further alleges that its order of December 7, 1931, which is the order that the petition herein prays be perpetually set aside, suspended and annulled and its enforcement enjoined in so far as it requires, authorizes or approves the existing divisions of said transit rates, makes no requirement, gives no authorization or approval, and contains no provision whatsoever in reference to divisions of said transit rates.

IX

Answering paragraph (9) of the petition, the Commission admits the allegation that the transit rates referred to are now on file with the Commission, pursuant to law, and are in full force and effect. The Commission denies that said rates apply on grain, grain products, and grain by-products originating at Peoria and alleges that said rates apply from Peoria only on traffic originating in the territories described in the tariffs now on file with the Commission naming said rates as Trans-Mississippi territory, Northern Iowa territory, Illinois-Iowa territory and Northwestern territory, and that said rates vary depending upon the origin of the traffic, the rates from Peoria to New York, N. Y., taken as typical, being, in cents per 100 pounds, 32.5, 31, 32.5, and 30.5, respectively, on traffic originating in Trans-Mississippi, Northern Iowa, Illinois-Iowa, and Northwestern territories, respectively, and that said tariffs contain many other rules, regulations and conditions describing, restricting, and delimiting the application of said rates. The Commission neither denies nor admits the allegation that petitioner is required by law to perform a transportation service under said rates, for the reason that said allegation is a conclusion of law. The Commission denies the allegation that the rail-[fol. 26] road defendants herein are now allowing to petitioner and petitioner is receiving the divisions referred to, or any other divisions of said transit rates, either under authority or by virtue of the Commission's report and order of December 7, 1931.

X

Answering paragraph (10) of the petition, the Commission denies the truth of the allegations contained therein.

Further answering paragraph (10) of the petition, and also further answering paragraph (8) of the petition, the Commission denies that its order of December 7, 1931, requires either the continuance or the future application or enforcement of the divisions of the transit rates referred to in the petition; denies that the effect of said report and order of December 7, 1931, is either to authorize or require the application of the present divisions of said transit rates; denies that either said order or the effect thereof is to require petitioner to engage in the transportation of said

traffic under said transit rates from Peoria to the destinations in question; and denies that either its decision or conclusions, or its action in refusing to grant the administrative relief prayed in the complaint filed with it (Exhibit A, pages 15 to 21, inclusive, of petition) were or are either unreasonable or arbitrary or unlawful or void for the reasons, or for any of the reasons, set forth in said petition.

XI

Answering paragraph (11) of the petition, the Commission denies the allegations contained therein, with the exception that it neither denies nor admits the allegations con- [fol. 27] sisting of inferences from the Commission's report and order, but calls the Court's attention to the fact that the Commission did consider certain facts of record, as set out in its report, which were important in its consideration of "the importance to the public of the transportation services" of the petitioner for the performance of which it sought increased divisions, an element which section 15 (6) of the Interstate Commerce Act requires the Commission to consider.

XII

Answering paragraph (12) of the petition, the Commission denies the allegations of fact contained therein. The Commission admits that said paragraph correctly quotes paragraph (b) of section 208 of Transportation Act, 1920, 41 Stat. 456, 464, (U. S. Code, title 49, sec. 76) and calls the Court's attention to the fact that no duty is imposed upon the Commission to enforce the provisions of that paragraph.

XIII

Answering paragraph (13) of the petition, the Commission denies the allegation that its order of December 7, 1931, authorizes and requires the divisions of said transit rates and denies that unless said order is set aside and its enforcement enjoined petitioner will sustain irreparable damage.

Further answering paragraphs (10), (12), and (13) the Commission particularly denies that petitioner will be deprived of its property either without due process of law or without just compensation unless said order of December 7, 1931, is suspended, set aside, annulled and its enforcement enjoined.

[fol. 28] XIV

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the petition in so far as they conflict either with the allegations herein or with either the statements or conclusions of fact included in said report of December 7, 1931.

Further and affirmatively answering said petition the Commission respectfully alleges that the Court is without jurisdiction over this cause for the following reasons:

XV

The subject matter of the complaint is a certain order of the Commission which grants the petitioner the relief sought in respect of the divisions of the local or non-transit rates from Peoria and Pekin, and in so far as the divisions of the transit rates are concerned requires neither the doing nor the abstaining from doing of any act and, therefore, under pertinent decisions of the United States Supreme Court it is an order of a kind over which this Court has no jurisdiction.

XVI

Said order of the Commission is not an order within the meaning of the Commerce Court Act (36 Stat. 539) or the Urgent Deficiencies Act (38 Stat. 219), or within the meaning of any act authorizing suits against the United States in the District Courts of the United States to enjoin, set aside, annul, or suspend orders of the Interstate Commerce Commission.

[fol. 29] XVII

The special court, convened and constituted of three judges as required by the Urgent Deficiencies Act, is without jurisdiction to enjoin the common carriers named as defendants in the petition from applying and enforcing against petitioner the divisions of said transit rates referred to in the petition.

XVIII

The petition does not contain either statements or allegations of fact which show that the said order of the Com-

mission causes petitioner or will cause petitioner such legal injury as entitles it to maintain this suit.

All of which matters and things the Commission is ready to aver, maintain, and prove, as this Honorable Court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, by J. Stanley Payne, Assistant Chief Counsel. Daniel W. Knowlton, Chief Counsel, of Counsel.

[fols. 30 & 31] *Duly sworn to by Claude R. Porter. Jurat omitted in printing.*

[fol. 32] [File endorsement omitted]

[fol. 32-1] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF RAILROAD DEFENDANTS—Filed Feb. 8, 1932

Come now the Baltimore and Ohio Railroad Company, Boston and Maine Railroad, the New York Central Railroad Company, lessee of Boston and Albany Railroad; Buffalo, Rochester and Pittsburgh Railway Company, the Central Railroad Company of New Jersey, Central Vermont Railway, Incorporated; the Chesapeake and Ohio Railway Company, Chicago and Erie Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Delaware, Lackawanna and Western Railroad Company, Erie [fol. 32-2] Railroad Company, Grand Trunk Western Railway Company, Lehigh and New England Railroad Company, Lehigh Valley Railroad Company, Maine Central Railroad Company, the New York Central Railroad Company, lessee of Michigan Central Railroad; the New York Central Railroad Company, the New York, Chicago and St. Louis Railroad Company, the New York, New Haven and Hartford Railroad Company, New York, Ontario and Western Railway Company, New York, Susquehanna and Western Railroad Company, the New Jersey and New York Railroad Company, Norfolk and Western Railway Company, The Pennsylvania Railroad Company, Pere Marquette Railway Company, Reading Company, Rutland Railroad Company,

Walter S. Franklin and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, and Western Maryland Railway Company, and for their answer to the petition herein, say:

I

They admit for the purpose of this suit that the allegations contained in paragraph 1 of said petition are true, except—

(1) They deny that petitioner acquired all the right, title and interest of the Chicago and Alton Railroad Company and the Receivers in and to the railways and property of [fol. 32-3] the Chicago and Alton Railroad Company, and that petitioner succeeded to all the rights, duties and obligations of said Railroad Company and the Receivers thereof with respect to the subject matter of this suit.

(2) They deny that defendant, United States, is sued pursuant to express authority of the Congress of the United States, as provided in an act approved October 22, 1913, known as the "Urgent Deficiency Appropriations Act," (38 Stat. L. 219; Chap. 32, Title 28, Sections 43 to 48, United States code, 1926).

II

They admit for the purpose of this suit that the allegations contained in paragraph 2 of said petition are true.

III

They admit for the purpose of this suit that the allegations contained in paragraph 3 of said petition are true.

IV

They admit for the purpose of this suit that the allegations contained in paragraph 4 of said petition are true.

V

They deny that the allegations contained in paragraph 5 of said petition are relevant, competent or material to the issue raised by said petition for the reason that the divisions of said joint through rates applicable to the trans- [fol. 32-4] portation of said transit and non-transit traffic prior to July 1, 1928, are not referred to, included in, or in

any way affected by the said order of said the Interstate Commerce Commission of December 7, 1931.

Further answering, they deny that the divisions, theretofore allowed the Railroad Company or the Receivers, of said joint through rates applicable to the transportation of said transit and non-transit traffic were, by these defendants, on July 1, 1928, or on February 1, 1929, without the consent of the Receivers and over their objection and without any order or finding of any court of commission, arbitrarily reduced, as alleged in paragraph 5 of said petition.

VI

They admit the filing on June 21, 1929, with the Interstate Commerce Commission of the complaint referred to in paragraph 6 of said petition.

VII

They admit that the allegations contained in paragraph 7 of said petition are true.

VIII

They admit that the allegations contained in paragraph 8 of said petition are true, except that they deny that the Interstate Commerce Commission in its report and order on rehearing made December 7, 1931, approved, authorized and required for future application and enforcement the present divisions accorded Receiver out of said joint reshipping rates.

[fol. 32-5] IX

They admit that the said joint reshipping or proportional rates referred to in paragraph 9 of said petition are, as alleged, on file with the Interstate Commerce Commission, and they admit that under said rates, so long as they are so on file with the Interstate Commerce Commission, petitioner is required by law to perform and is performing a transportation service; but they deny that there is any obligation or requirement of law or otherwise which imposes upon petitioner the duty or necessity of so filing said joint reshipping or proportional rates with said Interstate Commerce Commission.

Further answering, they deny that these railroad defendants are now allowing to petitioner and that petitioner is receiving, under authority and by virtue of the Interstate Commerce Commission's report and order of December 7, 1931, said alleged reduced divisions, and they deny that said alleged reduced divisions were approved and authorized by said Interstate Commerce Commission in said report and order.

They admit that said divisions constitute the only compensation now received by petitioner for said service, but they deny that said divisions do not pay the cost incurred by petitioner in performing said service.

X

They deny the allegations of paragraph 10 of said petition and to the contrary aver that said report and order of said Interstate Commerce Commission dated December 7, 1931, does not authorize and require the application of the divisions of said joint reshipping rates, found by said Commission in said report and order not to have been shown to [fol. 32-6] be unjust, unreasonable or otherwise unlawful; and they further aver that said report and order of said commission dated December 7, 1931, does not require petitioner to engage in the transportation of said transit traffic under said joint reshipping rates; and they further aver that said order is not unreasonable, arbitrary, unlawful and void; and they further aver that if permitted to remain in effect said order will not operate to confiscate the property of petitioner and deprive it of its property without due process of law and without compensation.

XI

They deny the allegations contained in paragraph 11 of said petition.

To the contrary these defendants aver that said Interstate Commerce Commission did not approve and authorize the present divisions allowed petitioner out of said joint reshipping rates in order to force petitioner to withdraw from said traffic and cancel its concurrence in said rates; and these defendants aver that the propriety of the continued publication and application by petitioner and by

these defendants of said joint reshipping rates and the continued participation of petitioner in the transportation of said traffic thereunder were issues in the proceeding before said Interstate Commerce Commission, because such matters are relevant and material and important in said Commission's consideration of the importance to the public of the transportation services of the Chicago and Alton Railroad and its Receivers, under the requirements of Section 15 (6) of the Interstate Commerce Act.

[fol. 32-7] XII

They deny that the allegations contained in paragraph 12 of said petition are true.

Further answering, these defendants aver that the allegations contained in paragraph 12 of said petition are irrelevant, incompetent and immaterial to the issues raised by said petition for the reason that the Interstate Commerce Commission has no authority to enforce agreements respecting divisions of rates or to enforce the requirements of Section 208 (b) of the Transportation Act, 1920.

XIII

They deny that the allegations contained in paragraph 13 of the petition are true, because—

(a) There is no relief which your Honorable Court can give to petitioner in this proceeding.

(b) Said divisions of said joint reshipping rates are not confiscatory and unlawful.

(c) Said divisions of said joint reshipping rates were not authorized and required by the said Interstate Commerce Commission in its said report and order of December 7, 1931.

(d) These defendants are not enforcing said alleged inadequate and confiscatory divisions under the authority of said report and order of said Interstate Commerce Commission dated December 7, 1931.

(e) The property of petitioner is not being confiscated without compensation because of the enforcement and application by said defendants of said divisions.

[fol. 32-8] (f) Said report and order of said Interstate Commerce Commission dated December 7, 1931, does not approve, authorize and require the enforcement and application by these defendants of said alleged unlawful and confiscatory divisions.

(g) Petitioner will not sustain irreparable damage.

XIV

Except as herein expressly admitted, these defendants deny the truth of all and singular the allegations contained in said petition insofar as they conflict either with the allegations herein or with either the statements or allegations of fact included in said Interstate Commerce Commission's report of December 7, 1931.

XV

Further and affirmatively answering said petition, these defendants respectfully allege that the Court is without jurisdiction over this cause for the following reasons, to-wit:

(a) The subject matter of complaint herein is a certain order of the Interstate Commerce Commission, insofar as it is complained of as being illegal, which requires neither the doing, nor the abstaining from doing of any act, and is an order of a kind over which this Court has no jurisdiction.

(b) Said order, insofar as it is complained of as being illegal, is not an order within the meaning of the Commerce Court Act (36 Stat. L. 539) or the Urgent Deficiency Appropriations Act (38 Stat. L. 219) or within the meaning [fols. 32-9 & 32-10] of any act authorizing suits against the United States or against these defendants or any of them.

(c) Said petition does not contain either statements or allegations of fact which show that said order of said Interstate Commerce Commission, insofar as it is complained of as being illegal, causes or will cause petitioner such illegal injury as entitles it to maintain this suit.

All of which matters and things these defendants are ready to aver, maintain and prove as this Honorable Court

shall direct, and hereby pray that the relief prayed for in said petition be denied.

Defendants Above Named, by —— ——, Their Solicitors.

STATE OF ILLINOIS,
County of Cook, ss:

J. L. Aber deposes and says that he is counsel for the above named defendants and makes this affidavit in their behalf; that he has read the foregoing answer and knows the contents thereof and that the same is true.

—— ——.

Sworn and subscribed to before me, the undersigned, a notary public in and for said county and state, this — day of February, 1932. —— ——, Notary Public. My commission expires —— —, ——.

[fols. 32a & 32b] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SETTING CAUSE—Feb. 10, 1932

On motion of the solicitors for petitioner herein, the solicitors for defendants consenting thereto,

It is ordered that the above entitled cause be set for hearing on Wednesday, February 24, 1932 at 10:00 o'clock A. M. in the courtroom usually occupied by me as a courtroom in the Federal Building, Chicago, Illinois, before the undersigned District Judge, another District Judge, and a Circuit Judge for the Seventh Judicial Circuit.

James H. Wilkerson, District Judge.

Dated February 10, 1932.

O. K.

Elmer B. Collins, J. Stanley Payne, for Interstate Commerce Commission. J. Lawrence Aber, for Railroad Defendants.

[fol. 33] In United States District Court for the Northern District of Illinois, Eastern Division

In Equity. No. 11347

The Alton Railroad Company, a Corporation, Petitioner,

vs.

The United States of America et al., Defendants

Narrative Statement of Evidence

Caption

Be it remembered that on the 24th day of February, A.D. 1932, the same being one of the days of said term of said court, before the Honorable Evan A. Evans, Circuit Judge, and the Honorable Walter C. Lindley and the Honorable Charles E. Woodward, District Judges, this cause came on for final hearing upon the pleadings heretofore filed herein.

Appearances

Frank H. Towner for petitioner.
Elmer B. Collins for United States of America.
J. Stanley Payne for Interstate Commerce Commission.
J. L. Aber and L. P. Day for all Railroad Defendants.

Whereupon petitioner offered in evidence the entire record, including all testimony, exhibits and other evidence introduced on the hearings before the Interstate Commerce Commission in its Docket No. 22487, William W. Wheelock et al. v. Akron, Canton & Youngstown Railway Company et al., the same being received in evidence and marked by the reporter as "Petitioner's Exhibit 1" (R. 3).

[fol. 34] Judge Evans: Do you intend to offer any proof?
Mr. Payne: The Commission has none, your Honor.
Mr. Collins: I have none.
Mr. Aber: We have none.
Judge Evans: Then the testimony is closed. (R. 4.)

(Petitioner's Exhibit No. 1 has been reduced to narrative form and is incorporated in this statement of evidence under the heading "Narrative Statement of Evidence Before the Interstate Commerce Commission" which immediately fol-

lows. The exhibits introduced in the hearings before the Interstate Commerce Commission and numbered from 1 to 33, both inclusive, have been certified and transmitted separately as original exhibits to the Clerk of the Supreme Court.)

OFFER IN EVIDENCE

Narrative Statement of Evidence before the Interstate Commerce Commission

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 22487

WILLIAM W. WHEELOCK and WILLIAM G. BIERD, as Receivers of the Railway and Property of the Chicago and Alton Railroad Company, Complainants,

vs.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY et al.

Before J. Edgar Smith

Chicago, Illinois, November 11, 1929.

APPEARANCES

F. H. Towner, representing the Chicago and Alton Railroad Company and its Receivers.

J. L. Aber and D. P. Connell representing the Central Freight Association defendants.

[fol. 35] Proceedings

Examiner Smith: The Interstate Commerce Commission has set for hearing at this time and place the complaint of William W. Wheelock et al. against the Akron, Canton & Youngstown Railway Company et al.

In this case it is alleged that the divisions accorded complainant out of the joint through rates applying upon the transportation of grain, grain products and by-products of grain from Peoria and/or Pekin, Illinois, were and are unlawful (Tr. 5), in violation of paragraph (b) of Section 208 of the Transportation Act and Section 4 of the Act to Regu-

late Commerce. The Commission is asked to order defendants to accord complainants lawful divisions out of the joint through rates.

J. A. BEHRLE was thereupon called as a witness for complainants, and being duly sworn testified as follows:

I am freight traffic manager of The Chicago and Alton Railroad Company at Chicago. I have been connected with the Traffic Department of that Company for more than 26 years and through consolidations and otherwise have been affiliated with the Toledo, St. Louis & Western Railway, the Minneapolis & St. Louis Railway, the Iowa Central Railway, the Chicago, Peoria & St. Louis Railway (Tr. 6) and the Terminal Company at Peoria. I have had charge of the divisions of the Alton for some years and have had complete charge of the controversy involved in this case. I have here the tariffs and division sheets that are involved. I wish to introduce Central Freight Association Tariff No. 245-D, issued by B. T. Jones as agent, under I. C. C. No. 2046, naming rates on grain, grain products and by-products of grain from Illinois points to Albany, Baltimore, Boston, New York and other points in what is known as Eastern Trunk Line territory, which, generally speaking, is the territory east of Buffalo and Pittsburgh (Tr. 7). The destination territory here in issue is that which is commonly known [fol. 36] as Eastern Trunk Line territory and is specifically designated in this tariff (Tr. 11).

Examiner Smith: You have indicated that you want this tariff to show points of origin, or territory of origin, and territory of destination, and the rates applicable.

Mr. Towner: The volume of the rates and their application.

The Witness: The transit privileges are contained in other tariffs. They are also in issue (Tr. 14).

(Said document was thereupon received in evidence as Complainant's Exhibit No. 1 and is certified to this court) (Tr. 15).

The Witness: This tariff, Exhibit 1, is the tariff referred to in the complaint and contains a designation of the commodities, origin territory, destination territory, rates and

their application, as those matters are involved in this complaint.

As my next exhibit, I offer a copy of Joint Rate Committee Circular No. 145, corrected, showing percentage allowances to western roads on eastbound traffic, effective April 15, 1913, and superseding Joint Rate Committee Circular No. 117, which was superseded by Exhibit No. 2, became effective April 16, 1900 and superseded Circular No. 80 which was of earlier date (Tr. 17). Circular 117 was the same as Exhibit 2 with respect to the percentage proportion to the Alton from Peoria to Chicago, Joliet and Dwight on business to points east. It allowed 20%. Exhibit 2 only shows the situation since 1913 but the percentages became effective at a much earlier date. Exhibit 2 has never been specifically cancelled.

(Said document was received in evidence as Complainant's Exhibit No. 2 and is certified to this court).

My next exhibit shows Peoria and Pekin "connecting line", "beyond", "proportional" and "special" percentages via Chicago, Joliet and Dwight (Tr. 18).

(Said document was thereupon received in evidence as Complainant's Exhibit No. 3 and is certified to this court).

[fol. 37] On pages 1 to 28 of Exhibit 3 are shown the percentages for the hauls from Peoria to Chicago, Joliet and Dwight; the point of destination, the route east of the Alton to such destination; the reference to the division sheet; and the effective date of the current division sheet. The Alton handles this traffic from Peoria to Dwight, Joliet, Chicago and Chicago Junctions. The percentages shown on Exhibit 3 applies to all those junction points (Tr. 19). Exhibit 3 shows the specific divisions accruing to the Alton. These divisions differ as to junctions, depending upon the line handling the traffic. On the sheet following page 28 of the exhibit there is a list of the percentage sheets to which reference has been given on pages 1 to 28. On the two following sheets the descriptions are shown of the terms "connecting line," "beyond," "proportional" and "special" percentages (Tr. 20). The first division sheet on page 1 of Exhibit 3 is identified by the figure 1. It allows to the Alton 15.30% on the commodities involved in

this case moving to Albany, New York, via the Alton, Michigan Central and New York Central. On the page following page 28 of Exhibit 3, No. 1 is identified as Division Sheet No. 328-B, issued by the New York Central, and on the next page that particular division sheet is described as applying on traffic to or from connections. That is the connection of the three (Tr. 21). That means applying only on traffic to or from connections at Peoria or Pekin. The last two sheets of Exhibit 3, hooked up in that fashion, show the specific application of each one of the sheets listed on the first 28 pages of the exhibit (Tr. 22).

Mr. Towner: No exhibit that we have introduced or will introduce will apply upon any commodity other than grain, grain products and grain by-products, moving from Peoria and/or Pekin to this destination territory, as specified in the complaint and described in Exhibit 1.

The Witness: The special division sheets listed in Ex- [fol. 38] hibit 3 are all of the division sheets of that class that are now in effect and applies upon this traffic from Peoria and/or Pekin (Tr. 23). I say these division sheets are still in effect because none of them have been specifically cancelled. The percentages specified in Exhibit No. 2 were in effect when all of the special division sheets listed in Exhibit No. 3 were issued (Tr. 24).

Mr. Towner: Complainants' Exhibit No. 2, allowing the Alton 20 per cent for its haul on this traffic east of Peoria, for example, was in effect when the division sheets listed in Exhibit 3 were issued. From the wording of Exhibit 2 the percentages allowed by it applied on all traffic. The division sheets listed in Exhibit 3 constituted exceptions to the application of the percentages shown by Exhibit 2 and verified, depending upon the route (Tr. 25). The contention of the Alton was that the division sheets listed in Exhibit 3 only operated to subdivide the revenue east of Peoria, the revenue having first been divided upon Peoria as between the eastern and western lines, and that it was entitled to receive the 20 per cent specified in Exhibit 2 upon all traffic transited at Peoria and reshipped from there. The eastern lines insisted that the division sheets listed in Exhibit 3 apply not only on traffic that moved through Peoria on joint through rates applying from east to west but that they

also apply on traffic moving from Peoria on the reshipping or proportional rates. We contended that this was improper.

We shall also show that there has been a still further change in the divisions applying upon this reshipping traffic moving under the reshipping or proportional rates (Tr. 26), made effective without any cancellation of Exhibit 2 or of the division sheets listed in Exhibit 3. It is our contention that the 20 per cent under Exhibit 2 would apply on all the commodities that came to rest at Peoria and Pekin and were afterwards reshipped from there under a reshipping rate or otherwise. The divisions set out in [fol. 39] Exhibit 3 properly apply only on through traffic passing through Peoria and Pekin (Tr. 27). We contend that traffic reshipped from Peoria and received by the Alton from a grain elevator in which it has been in storage for a considerable time, is not traffic received from a connection, and that consequently specific division sheets could not apply and that the 20% specified in Exhibit No. 2 would apply (Tr. 28).

Mr. Behrle: I have heard what has been said and it is correct.

My next exhibit is a reproduction of Central Freight Association Lines' Division Sheet No. 226, applying in connection with C. F. A. T. B. Tariff No. 245-D, I. C .C. No. 204, issued by B. T. Jones. This division sheet was issued by Jones as agent for the Central Freight Association Lines on July 14, 1928, to become effective July 1, 1928.

(Said document was received in evidence as Exhibit No. 4 and is certified to this court.)

Still another division sheet has been issued (Tr. 29). Division Sheet 226 (Exhibit No. 4) was cancelled by Sheet 226-A, which is my next exhibit and applies in connection with C. F. A. T. B. Freight Tariff No. 245-D. It was issued by B. T. Jones as agent for the Central Freight Association Lines on February 9, 1929, to take effect February 1, 1929.

(Said document was received in evidence as Complainant's Exhibit No. 5 and is certified to this court.)

The difference between Exhibit No. 4 and Exhibit No. 5 is that grain by-products, which was specified in Exhibit No. 4

has been eliminated in Exhibit No. 5. Exhibit No. 5 applies only on grain or grain products in carloads (Tr. 30). The situation with respect to by-products of grain reverts back to the situation obtaining prior to the issuance of Exhibit No. 4. Exhibits No. 4 and No. 5 are eastern lines' division [fol. 40] sheets and the Alton is not a party to them and took no part in their issuance. It was not consulted when they were issued and never did agree to the divisions provided for by them. It objected strenuosuly to those divisions and asked to have them cancelled but the request was refused (Tr. 31). The divisions specified in Exhibits 4 and 5 were issued without the concurrence of the Alton and over its protest. I know of no decision of any Commission or any court under the authority of which these divisions were established. It was a voluntary action on the part of the eastern lines through the Central Freight Association.

My next exhibit is a freight tariff of the Illinois lines, issued by E. B. Boyd as agent, bearing Tariff No. 152-I, I. C. C. No. A-1954. It contains local and joint switching rates to and from the Peoria-Pekin districts as described in the tariff.

(Said document was received in evidence as Complainant's Exhibit No. 6 and is certified to this court.) (Tr. 32.)

My next exhibit is a copy of Central Freight Association Tariff Bureau Freight Tariff No. 322-A, issued by B. T. Jones as agent under I. C. C. No. 1793, effective August 28, 1926, containing rules governing joint transit privileges on transit grain at Peoria District stop-over points. It is known as a transit tariff.

(Said document was received in evidence as Complainant's Exhibit No. 7 and is certified to this court.)

My next exhibit is a copy of Central Freight Association Freight Tariff Bureau No. 319-B, issued by B. T. Jones under I. C. C. No. 1811, effective August 28, 1926, covering rules governing milling and malting in transit privileges at Peoria District stop-over points (Tr. 33). Exhibit No. 7 covered grain transit and this document covers the milling and malting privileges.

(Said document was received in evidence as Complainant's Exhibit No. 8 and is certified to this court.)

Our next exhibit is a copy of Central Freight Association [fol. 41] Freight Tariff No. 344-B, issued by B. T. Jones under I. C. C. 2171, effective May 30, 1929, containing rules covering joint transit privileges on feed at Peoria district stop-over points.

(Said document was received in evidence as Complainant's Exhibit No. 9 and is certified to this court.)

My next exhibit is Illinois Freight Association Freight Tariff No. 256-D, issued under I. C. C. No. 1916, effective June 21, 1927. It is a tariff naming class rates (Tr. 34) between points in Illinois.

(Said document was received in evidence as Complainant's Exhibit No. 10 and is certified to this court.)

My next exhibit is a copy of Central Freight Association Freight Tariff No. 218-F, issued by B. T. Jones as agent, effective November 1, 1928, under I. C. C. No. 2123. This tariff names rates on classes and commodities from points in Illinois to the destination territory involved in this complaint.

(Said document was received in evidence as Complainant's Exhibit No. 11 and is certified to this court.)

My next exhibit is a statement showing the domestic rates on grain, grain products and by-products of grain from Peoria and Pekin, Illinois, to eastern basing points and points taking the same rates. The points of origin and destination are those referred to in the complaint (Tr. 35). The points taking the same rates are those referred to on pages 150 to 154, inclusive, of Exhibit No. 1. The territorial descriptions "Trans-Mississippi", "Northern Iowa," "Illinois-Iowa" and "Northwestern" are defined in Notes 25, 30, 35, 40 and 45 on pages 137 to 145 of Exhibit No. 1. The export rates to Atlantic ports are shown on pages 218, 231, 224, 227 and 229 of the same exhibit.

(Said document was received in evidence as Complainant's Exhibit No. 12 and is certified to this court.)

This exhibit restricts the rates via the Alton so that on Northwestern grain the rates of the Alton (Tr. 36) do not apply on grain and grain products via junctions north of [fol. 42] Chenoa. On pages 1 to 5 of Exhibit No. 12 the rates

from Peoria and Pekin to eastern trunk line points are shown. Under the heading of "local" rates are shown the rates which apply on shipments not subject to the lower transit rates. When inbound billing is surrendered covering shipments from Trans-Mississippi, Northern Iowa, Illinois-Iowa and Northwestern Territories, from which no through rates are in effect, the shipper is given the benefit of the lower rate, so distinguished by reason of the different origin territories. The word "local" as I have used it in the exhibit is only for the purpose of distinguishing between grain entitled to a reshipping or proportional rate outbound and grain not entitled to that rate (Tr. 37). If grain was raised around Peoria or Pekin and offered to the Alton for transportation to Albany, the rate would be 32 cents. If the grain was in an elevator and had come from Mississippi territory and was hauled by the Alton in transportation to Albany and the inbound billing was surrendered, the charge would be 25 cents. If, however, the transit time had expired upon the grain in the elevator from Trans-Mississippi territory before it was shipped outbound, it would move at the 32 cent rate (Tr. 38). Also if grain grown at Peoria was placed in an elevator with a carload of Trans-Mississippi River grain, the grain which originated at Peoria could move out of Peoria on the Trans-Mississippi River rate, provided the billing covering the inbound shipment from Trans-Mississippi River territory was surrendered. That is because no physical distinction is made between grain of the same grade, which is entitled to transit and that which is not entitled to transit. There is a mixture of it and physical substitution is permitted (Tr. 39).

I desire to read into the record the rates on grain, grain products and grain by-products from Chicago to New York as an illustrative destination point. These rates are contained in tariffs which have been introduced. The grain rates from Chicago are local 38 cents, Trans-Mississippi 30 cents, Northern Iowa 30 cents, Illinois-Iowa 30 cents and Northwestern 30 cents. These are the rates from Chicago [fol. 43] to New York (Tr. 40). On grain products the local rate is 38.5 cents, Trans-Mississippi 30.5 cents, Northern Iowa 30.5 cents, Illinois-Iowa 30.5 cents and Northwestern 30.5 cents. On grain by-products the local rate is 32.5 cents, Trans-Mississippi 32.5 cents, Northern Iowa 32.5 cents, Illi-

nois-Iowa 32.5 cents and Northwestern 32.5 cents. The difference between the rates that I have just read and the corresponding rates on the last page of Exhibit No. 12 are what the Alton has been receiving under reshipped grain under Exhibits 4 and 5. Where there was no difference in the rates the Alton got nothing. I refer to page 5 of Exhibit 12 (Tr. 41). The carriers east of Chicago demand their full reshipping rates.

Mr. Towner: To illustrate, the reshipping rate to New York on traffic from Northwestern territory is 30 cents. That is the rate both from Peoria and from Chicago. If a shipment comes from Peoria over the Alton and is hauled to Chicago and delivered to an eastern line, the eastern line takes the 30 cents, which is all of the revenue (Tr. 42).

The Witness: The rates via the Alton do not apply on grain and by-products of grain from Northwestern territory via junctions north of Chenoa. They do, however, apply on grain products.

My next exhibit is a statement showing the routes employed in the transportation of grain, grain products and grain by-products from Peoria and Pekin via the Alton to the destination territory involved in the complaint (Tr. 43).

(Said document was received in evidence as Complainant's Exhibit No. 13 and is certified to this court.)

The information on Exhibit 13 was taken from the Auditor's records of the Alton and from his statements of amounts which the Alton is outstanding. It covers 38 destination lines via 274 routes and shows the routes taken by over 6,500 cars. The period covered is, roughly speaking, 5 years but most of the traffic has moved within the last 2 years (Tr. 44). The number of railroads handling the traffic is few as compared with the number of routes over [fol. 44] which it moves. The routes shown on Exhibit 13 are fully representative and typical of the routes traversed by the traffic at this time and those used by it in the past. They are not only typical but actual routes (Tr. 45) and were taken from the movement of 6,500 cars.

My next exhibit is a map.

(Said document was received in evidence as Complainant's Exhibit No. 14 and is certified to this court.)

This map shows the United States with portions of Canada and Mexico. The line of the Alton in Illinois is

shown in red from Peoria and Pekin to Chicago. East of the line of the Alton there is shown in blue the lines and routes corresponding to the actual movement (Tr. 46) of the 6,500 cars upon which Exhibit 13 was based. This exhibit is a map picture of the routes listed in Exhibit 13. The lines which would receive this traffic at Chicago are the Baltimore & Ohio, Big Four (Tr. 47), Erie, Grand Trunk, Michigan Central, New York Central, New York, Chicago & St. Louis, Pennsylvania, Pere Marquette and Wabash. At Joliet the traffic would move direct in connection with the Michigan Central and via the Elgin, Joliet & Eastern as an intermediate carrier between the Alton and the eastern lines with which it ordinarily connects at Chicago. At Dwight the interchange is with the New York Central. On Exhibit 14 Northwestern territory is outlined in green, Northern Iowa territory is outlined in brown and Trans-Mississippi River territory is outlined in red. Illinois-Iowa territory is outlined in purple (Tr. 48). Those territorial boundaries are taken from Exhibit No. 1.

My next statement shows the earnings of the Alton and the eastern lines on shipments of grain, grain products and grain by-products.

(Said document was received in evidence as Complainant's Exhibit No. 15 and is certified to this court) (Tr. 49).

The shipments are tabulated in date order with the latest shipments on top. They are typical and representative shipments out of a movement of over 6,500 cars and are typical and representative of the traffic and the earnings accruing to the various carriers under the division sheets [fol. 45] in the record. The earnings shown are actual. My object was to take enough shipments to show every situation that appeared in my investigation of 6,500 shipments. The shipments shown are representative and typical of the entire movement (Tr. 50). On Sheet 1 are shown the description of the shipment, origin, destination, route, commodity, way-bill number, date of shipment, weight and rate, mileages, division of revenue in cents per 100 pounds, percentage of revenue received by each line, earnings of each line in dollars and cents and earnings per ton mile. The sheet also shows the result of a mileage prorate in percents and in dollars and cents per car and a first-class prorate. On Sheet 2 the so-called non-transit tonnage is

taken into account. This is tonnage upon which the transit privilege has expired or which has never been susceptible to a transit privilege. It moves at a higher rate. A portion of this tonnage is usually included in a car, a greater part of which, however, consists of traffic moving under proportional rates (Tr. 51). One carload will have some tonnage entitled to the proportional rate and some tonnage not entitled to the proportional rate and which therefore pays the higher rate. It is all in one carload but the revenue is figured differently on the two parts of the same shipment. To arrive at the total earnings per car, the revenue on the non-transit shipment must be added to the earnings on the transit part of the car. Sheet 2 of the exhibit shows the weight, rate charges and all percentage on the non-transit portion, the earnings on the non-transit portion and on the transit portion, the total earnings per car divided between the Alton and the eastern lines, the earnings per car mile and the earnings of the Alton after absorption of switching (Tr. 52). The deduction shown does not cover the terminal charge of the Peoria and Pekin Union Railway at Peoria, commonly known as the in-and-out charge and discussed in Docket 14534, reported at 115 I. C. C. 469, nor the switching of the returned empty cars at Chicago. [fol. 46] The switching absorption shown on the exhibit is the actual absorption by the Alton of the tariff switching charges of the switching carriers. It is a cash expenditure. The exhibit consists of a succession of sheets numbered 1 and a succession of sheets numbered 2. In every instance the sheet numbered 1 and the sheet numbered 2 cover the same shipment (Tr. 53), the use of the two sheets being necessary because of the addition of non-transit tonnage to a carload containing transit grain. On the shipment shown on the first sheet, the Alton received no revenue. The second sheet shows that it received 20% of the charges on the non-transit tonnage or $2.85, which was the total earnings of the Alton on that car. The total switching absorptions of the Alton were $9.70 so that it suffered a loss of $6.85 in money expended on the car (Tr. 54). The $2.85 received by the Alton on the non-transit tonnage in that car represents the 20% allowed under Exhibit No. 2. The distribution of revenue on Sheet 1 represents an application of Exhibits 4 and 5. Some of the shipments shown in this exhibit are those upon which the Alton was allowed

connecting line percentages on the transit traffic so that in those cases it received some revenue on the transit traffic in addition to the revenue on the non-transit part of the shipment. The sheets throughout this Exhibit 15 are numbered 1 and 2. In the case of the last shipment shown on this Exhibit, which is the oldest shipment, the shipment moved on February 1, 1917, the Alton was allowed 17% (Tr. 56). Its earnings on the transit part of the shipment were $16.95. On the next sheet it is shown that its earnings on the non-transit part of the shipment were $2.51, making its total earnings $19.46. After deduction of switching which was absorbed at Peoria and Joliet, the total earnings to the Alton were $10.09 on the car. The earnings to the Alton on the transit part of this shipment, represent an application of one of the connecting percents shown in Exhibit No. 3 (Tr. 57). One of those specific division sheets was applied to the prejudice of the 20% allowance specified in Exhibit No. 2. The Alton also received 17% on the [fol. 47] non-transit part of that shipment. That was the actual settlement but I do not know how it was arrived at. It might be an error. The non-transit part of the shipment, under any theory, should have been subject to the 20% division shown in Exhibit 2 (Tr. 58). We managed to get 17% of it in this case. An examination of all the sheets of this exhibit would show the same relative situation.

I wish to introduce a statement of mileages.

(Said document was received in evidence as Complainant's Exhibit No. 16 and is certified to this court.)

Exhibit 14 shows Suspension Bridge and Buffalo, New York, as points through which a large number of the routes operate. Exhibit 16 shows a statement of the mileages from Chicago, Joliet and Dwight to Suspension Bridge and from Joliet and Dwight to Buffalo, as compared with through mileages from Peoria via a number of routes involving the Alton as an initial carrier (Tr. 59) and lines leading east from Peoria other than the Alton. From Peoria to Suspension Bridge, via the Alton, Elgin, Joliet & Eastern, and the Wabash is 630 miles, which is shorter than the New York Central, Michigan Central route by 34 miles and longer than the route via the Toledo, Peoria & Western, the Pennsylvania, Panhandle, Wabash and Grand Trunk, which is a highly improbable route, by only 17 miles.

To Buffalo, the Alton, through Dwight, the New York Central to Knox and the Nickel Plate beyond, with a mileage of 629 miles, is only 11 miles longer than the route via the Toledo, Peoria & Western, the Pennsylvania and the Nickel Plate, and 29 miles less than the Nickel Plate mileage direct of 658 miles and 48 miles less than the Big Four mileage to Cleveland and the New York Central beyond of 677 miles. The exhibit shows that the Alton comprises part of a direct route from Peoria and Pekin to the east (Tr. 60). The route of the Alton, Elgin, Joliet & Eastern and the Wabash from Peoria to Suspension Bridge is 630 miles. The route of the New York, Chicago & St. Louis, Detroit & Toledo Shore Line and Michigan Central is 677 miles (Tr. 61). The Alton route is 47 miles less than the [fol. 48] latter route. The traffic under consideration moves at joint through rates from Peoria or Pekin to points of destination in Eastern Trunk Line territory. Some traffic originates beyond Peoria or Pekin and moves through those points without transfer or any break in the continuity of the shipment. In such cases the Alton assumes the charge for the terminal service performed beyond the line of the inbound carrier under the decision of the Commission at 115 I. C. C. 469 (Tr. 62). This traffic, however, is the lesser movement. The larger movement originates at industries having private sidings in the Peoria and Pekin switching districts and consists mainly of mill feed. Grain or any other ingredient of the product moves to Peoria or Pekin at local rates. The car is switched to the plant, unloaded and released and the consignee pays to the inbound carrier the charges from point of origin to Peoria at the local rate. This ends the inbound transaction. There is nothing attached to the inbound shipment to indicate in any way any destination other than Peoria or Pekin and nothing to indicate what disposition will be made of the inbound shipment. It may be sold or resold and may terminate in Peoria. It may be manufactured into another commodity; it may be shipped elsewhere; but if so, the destination is unknown, as is also the carrier which may transport it to destination. The identity of the inbound shipment is not preserved, and one inbound shipment may be part of the ingredients of numerous outbound shipments. When the inbound car is unloaded, the transit bureau at Peoria is notified in writing.

Within ten days the inbound paid freight bill is surrendered to the transit bureau. When an outbound shipment is made, the shipper prepares what are termed "transit-shipping directions", describing the commodity, the quantity and naming the consignee, destination (Tr. 63), rate and route and giving all the information contained in the bill of lading. In addition, the shipper gives [fol. 49] reference to the billing of an inbound car, the whole weight or part of which he has selected to apply against the outbound shipment. The bureau verifies the rates and makes a record so that the same inbound tonnage may not again be used by the shipper. A copy of these directions, verified by the Bureau, is given the railroad agent who bills the shipment from Peoria. If the shipper fails to use the inbound billing to obtain a lower rate on the outbound shipment within 12 months, the billing becomes void and is cancelled by the bureau. The transportation to Peoria and Pekin and the transportation from Peoria and Pekin are two separate and distinct transactions. It is the act of the shipper in specifying certain billing of an outbound shipment which gives him the benefit of the so-called proportional rate. The actual handling of the shipment given the proportional rates is the same as is given a shipment not susceptible to transit and which is, therefore, moved at a higher rate. A majority of shipments moving under proportional rates are combined with other portions in the same car on which higher rates are applied (Tr. 64). There is no distinction in service between the two classes of traffic. The Alton performs precisely the same service on a shipment under a proportional or reshipping rate as under a local rate—there is no distinction at all. For many years the Alton has participated in joint through rates on grain, grain products and grain by-products from Peoria and Pekin to points in eastern trunk line territory. There is in effect and of long standing a division sheet agreed upon by the eastern and western lines, and under this division sheet the lines from Peoria to Chicago, of which the Alton is one, received 20% of the through rate. That division sheet is Exhibit No. 2 (Tr. 65). In some cases the terminal charges of the eastern lines are first deducted. There are also in effect percentages from Peoria to the east via Chicago, Joliet and Dwight, commonly referred to as connecting line, special,

proportional or beyond percents. These percentages were [fol. 50] designed to apply to traffic moving in uninterrupted service at through rates via Peoria and Pekin and were generally so applied. They are shown in Exhibit 3. The destination lines used these percentages in the distribution of revenue on shipments moving under joint through rates from Peoria and Pekin and it became necessary to correspond with them to secure a proper readjustment on the basis of the joint rate committee percentages. The situation was aggravated in September, 1927, when the eastern roads generally began to restrict the Alton to the lower connecting line percentages. In endeavoring to ascertain the cause of our difficulty, we were referred to a rport of a committee of eastern lines dated August 1, 1927, which recommended that the Peoria-Chicago lines be given connecting line divisions. We protested to the Central Freight Association which then concluded to take reshipping rates east of Chicago (Tr. 66). These reshipping rates gave them a little more than the connecting line percentages. Under this restriction we received but 2 cents per 100 pounds on Trans-Mississippi and Illinois-Iowa proportional rates, one-half cent per 100 pounds on Northern Iowa rates, and nothing out of the Northwestern rates. Those percentages allowed to the eastern lines by their own action are shown in Exhibits 4 and 5. We protested this action and for more than a year endeavored to secure a change in the attitude of the eastern lines, but without result. We were not disposed to permit the situation to continue, as the Alton is part of a direct line to the east (Tr. 67). We are much in need of the freight traffic and the shippers in Peoria recognize the advantage of a direct line to the east and are favorably inclined towards us. The action of the eastern lines in taking their reshipping rates east of Chicago, if permitted to prevail, will force us to forego this business, which we are not disposed to do. Even the connecting line percentages yield to the Alton insufficient earnings. The rates are a fixture.

[fol. 51] I wish to introduce in evidence an exhibit containing parts of the records of the Illinois Freight Association and the Central Freight Association, dealing with this particular point.

(Said document was received in evidence as Complainant's Exhibit No. 17 and is certified to this court.)

The Alton is a member of the Illinois Freight Association (Tr. 68). It is not a member of the Central Freight Association. We were first apprised of the move to reduce our earnings in September, 1927, and upon demanding the authority of the eastern lines were referred to the proceedings of a meeting of the Chicago District Committee of the Central Freight Association held on August 1, 1927. Proceedings of this meeting are shown in the first sheet. On September 17 we requested the Chairman of the Illinois Freight Association to place this matter on the docket for consideration by his lines. On September 22, Chairman Morris of the Central Freight Association informed his member lines of the previous action of his committee and stated that the traffic officials of the western carriers had been notified by letter of this action. He requested his lines to make settlement on the basis of the divisions outlined in the committee report, which was that the lines east of Chicago would receive reshipping rates (Tr. 69). On September 24, 1927, Chairman Morris notified us that at a meeting of his lines on September 6, it had been decided that in the division of the Peoria reshipping rates on grain via Chicago the eastern lines would not accept less than their reshipping rates east of Chicago. That letter is the second sheet. On December 29, 1927, the Illinois lines asked the chairman of the Illinois Freight Association to communicate with the Central Freight Association in a protest against the action of that organization in demanding reshipping rates east of Chicago. The proceedings of the meeting are shown on pages 3 and 4.

Mr. Connell: We would have to object to this going into the record. The meeting was apparently attended by gen- [fol. 52] tlemen connected with railroads not even parties to this proceeding (Tr. 70). I would like to cross-examine some of the gentlemen who were parties to a recommendation that the Alton be given what they ask for (Tr. 71). The man who represented the Alton at that meeting is not present (Tr. 72).

Mr. Towner: Here is a man right here who can tell you what happened. I will produce a man who was there if you would rather have him.

Examiner Smith: You have your objection. I am going to overrule it and accept the exhibit.

Mr. Connell: I take an exception to your ruling (Tr. 73).

The Witness: On January 10, 1928, the chairman of the Illinois Freight Association reported to us the receipt of a letter from Chairman Morris of the Central Freight Association, in which he stated that the action of his Association was not based on any misunderstanding of the situation but was made with full knowledge of the situation because when the reshipping rates were established on grain and grain products from Peoria and East St. Louis to the North Atlantic Seaboard territory, there was an absolute understanding that in the event said rates were applied via Chicago the carriers west thereof would not be allowed in excess of their proportional per cents; that Chairman Galligan's letter must have been written through a misunderstanding or without having the facts; and that if any carrier east of Chicago was applying other than the "beyond" per cents in the division of the reshipping rates from Peoria, it was based upon individual action and was contrary to the announcement made by the Chicago eastbound roads at the time the reshipping rates on grain and grain products were first established; but that he had no objection to listing the subject for discussion at a joint conference which was suggested for January 13 (Tr. 74). In this letter the Central Freight Association argued that the connecting line percentages should be applied, but had already gone [fol. 53] on record as demanding the reshipping rates.

The meeting was postponed and finally held on February 6, 1928, when the Central Freight Association representatives said they would not accept less than their reshipping rates east of Chicago. This announcement is shown on pages 5, 6 and 7 of Exhibit 17. On March 16, 1928, the Central Freight Association lines were directed to readjust their revenues so as to accord them the reshipping rates east of Chicago, and a copy of the letter was sent to the Chairman of the Illinois Freight Association (Tr. 75). This letter is shown on page 8 of Exhibit 17. The letter states that when the reshipping rates were established some years ago from Chicago and Peoria it was with the distinct understanding that the reshipping rates would not apply via Chicago except on the basis of allowing the lines east of Chicago their reshipping rates, and that otherwise the ob-

ject of those rates from Chicago would be defeated. He said, with respect to pages 5, 6 and 7 of the exhibit, that the Illinois lines met with the Central Freight Association lines and that, after discussion, the Central Freight Association lines refused to take less than their reshipping rates east of Chicago (Tr. 76). At this meeting a number of questions were considered, including the question of rates on grain from Illinois to Central Freight Association territory, but the question of the division of rates (Tr. 77) on grain, grain products and by-products of grain from Peoria and Pekin via Chicago and Chicago junctions to Eastern Trunk Line territory was also considered. The effect of what was said by the eastern lines was that they said when it served their purposes that it has always been understood that connecting line per cents should apply to the traffic and that then when it best served their purposes, [fol. 54] they took the position that it had always been understood that they should receive the reshipping rates east of Chicago. They then argued that when the rates were established it was distinctly understood that the Peoria connecting line per cents should apply (Tr. 78), and after further argument said that at the time the rates were established it was distinctly understood that the eastern lines would get their reshipping rates. Both of these things could never have been plainly understood with respect to the same rates. The Alton never had any such understanding with respect to the divisions of these rates and has never agreed, specifically or inferentially with the eastern lines that either basis of divisions was proper upon reshipped traffic. On May 21, 1928, the Illinois Freight Association lines met and directed the chairman to communicate their views to the eastern lines, which was done by a circular of June 1, 1928, shown at pages 9 and 10 of Exhibit 17 (Tr. 79). On June 20, 1928, Chairman Galligan received from Chairman Morris of the Central Freight Association Division Sheet No. 226, which is Exhibit No. 4. It further appears that Chairman Galligan was later given to understand that the Central Freight Association lines would not demand the reshipping rates but would insist upon the connecting line percentages. Chairman Galligan wrote Chairman Morris stating that the position of the Illinois Freight Association lines was that local percentages should apply. This letter is shown on pages 11 and 12 of Exhibit 17. He received no

answer and again wrote Chairman Morris on December 21, the letter being shown on Sheets 13 and 14 of Exhibit 17. He later received a copy of Central Freight Association proceedings, affirming the announcements of the eastern lines of their intention to take the reshipping rates from Chicago (Tr. 80). On March 14, 1929, Chairman Morris wrote Chairman Galligan to this effect.

[fol. 55] At Chicago, the Alton connects with the Baltimore & Ohio, Chesapeake & Ohio, Chicago, South Shore & South Bend, Chicago, Indianapolis & Louisville, Big Four and Erie Railroads, through the Belt Railroad of Chicago. The interchange charge is $5.40 per loaded car and $2.70 on the returned empty. We connect with the Grand Trunk through the Illinois Northern, where we pay a charge trackage charge of 50 cents per loaded car and 25 cents per empty car. That is an operating contract arrangement. With the Michigan Central and the New York Central, the Alton connects through the Belt Railway of Chicago on charges of $5.40 per loaded car and $2.70 per empty car (Tr. 81). With the Nickel Plate the connection is through the Chicago Junction. The Alton operates over the Chicago Junction and pays it under operating contract $1 per loaded car and 50 cents per empty car. The Alton connects with the Pennsylvania through the Chicago River & Indiana, paying $5.40 per loaded car and $2.70 per empty car. These figures are the total charge of the intermediate line and the Alton pays it on all of this eastbound traffic. The Alton connects with the Pere Marquette and Pennsylvania through the Belt Railway of Chicago, paying charges of $5.40 per loaded car and $2.70 per empty car. It connects direct with the Elgin, Joliet & Eastern at Joliet. On traffic delivered to the eastern lines at Joliet, through the Elgin, Joliet & Eastern the Alton pays $3.15 a car. It has direct connection with the Michigan Central at Joliet and with the New York Central at Dwight (Tr. 82). Most of this traffic originates at the American Milling Company plants on the Peoria & Pekin Union Railway and the Chicago, Rock Island & Pacific Railway at Peoria and Pekin. The charge of the P. & P. U. is $3.15 per car of 40,000 pounds or less; 16 cents per ton on cars between 40,000 and 50,000 pounds; and $4.05 per car on cars over 50,000 pounds. The P. & P. U. makes direct connection with the Alton. The Rock Island switching

charge to the Peoria & Pekin Union is 16 cents per ton, with a minimum of $3.15 per car and a maximum of $4.05 [fol. 56] per car. The Rock Island has no direct connection with the Alton and the interchange is via the P. & P. U., which makes a charge of $3 per car. This $3 charge is an intermediate charge (Tr. 83). Some of this traffic moves from the Corn Products Refining Company at Pekin. It is located on the Peoria & Pekin Union and Peoria Railway Terminal which connect with the Alton at Pekin. Their switching charges are $4.95 per car. On a movement from the Corn Products plant at Pekin to the Alton, at Peoria, the charge of the P. & P. U. is $8.10 per car. The Peoria Terminal Company also charges this amount out of which it pays the expense of interchange via the Peoria & Pekin Union to the Alton. These charges are shown in Exhibit 6 (Tr. 84). The terminal charge of the Peoria & Pekin Union, at Peoria, known as the in-and-out charge, is now 65 cents per car. Every car between industries at Peoria and the Alton would be subjected to this charge. It is also known as the make-up and break-up charge (Tr. 85). It was dealt with by the Commission in its Docket 14534, and is made in addition to the switching rate. It is covered by contract and not by tariff. The Alton is a tenant of the Peoria & Pekin Union Railway, as it was at the time of the last decision of the Commission (Tr. 86). The other charges I referred to in connection with Exhibit 6 are tariff switching charges. Exhibit 6 was offered for the purpose of showing these rates and charges (Tr. 87).

The Alton also has a route from Pekin to Chicago, Joliet and Dwight, which does not go through Peoria. It is from Pekin to Chicago via San Jose and Bloomington. The mileages from Pekin via this route are 164.2 miles to Chicago, 127 miles to Joliet, 90.5 miles to Dwight, 54.8 miles to Bloomington and 18.8 miles to San Jose (Tr. 88). Most of the traffic shipped outbo-nd from Peoria upon the reshipping or proportional rates is livestock feed handled at the grain products rate (Tr. 90). Most of this traffic delivered to the connections of the Alton at Dwight, Joliet and Chicago is handled over the main lines of those car- [fol. 57] riers to the pivotal points in the east, such as Buffalo and Suspension Bridge. That is particularly true through Chicago. Through Joliet and the Elgin, Joliet

& Eastern, the freight goes to the main lines of the Eastern Trunk Lines at the more eastern points. Wherever the eastern lines get the traffic they handle it in direct main line movement from the point of receipt to the pivotal points I have described (Tr. 91).

Cross-examination:

My Exhibit No. 2 is a divisional arrangement between the railroads. It is the actual division sheet that is used (Tr. 92). The Illinois-Iowa territory was shown on the map that I offered and is the territory outlined in purple. It includes the west bank of the Mississippi River and takes in all of the State of Illinois (Tr. 92). I did not say that all the rates from Illinois points were involved in this case. I was asked as to the territorial application of the Illinois-Iowa territory and my response was directed to that inquiry (Tr. 95). The rates, the divisions of which are involved in this case, are the rates from Peoria to points east of the western termini of the Eastern Trunk Lines (Tr. 96). It is my understanding that the divisions of those rates are what are involved. I understand that we are only considering rates from Peoria and Pekin to points in Eastern Trunk Line territory (Tr. 97). The intent of the Alton in that respect is embodied in the complaint. I think my answer corresponds to the allegations of the complaint. The rates on grain, grain products and grain by-products from Peoria to Eastern Trunk Line points are made by the application of a percentage proportion to the Chicago rate with an equalization as between Chicago and Peoria. The base rate is the Chicago-New York rate (Tr. 98). That is true as to the so-called proportional rate. The local rate is made with relation to the application of an arbitrary proportion or a specific to the Chicago rate. I mean by that, the Chicago proportional rate or reshipping rate.

[fol. 58] Page 1 of Exhibit 12 shows the rate from Peoria to New York locally as 33.5 cents (Tr. 99). On proportional grain from Trans-Mississippi River territory the rate is 26.5 cents, on grain from Northern Iowa territory 25 cents, on grain from Illinois-Iowa territory 26½ cents and on grain from Northwestern territory 24½ cents. Those were the rates in effect from February 29 to August 25, 1920.

On successive sheets the rates grading up to the present rates are shown. Today the local rate on grain from Peoria to New York is 41½ cents. The proportional rates are Trans-Mississippi River 32 cents, Northern Iowa 30.5 Cents, Illinois-Iowa 32 cents and Northwestern 30 cents (Tr. 100). From Chicago the present local rate is 38 cents; the proportional rates are Trans-Mississippi River 30 cents, Northern Iowa 30 cents, Illinois-Iowa 30 cents and Northwestern 30 cents. The grain products rates are slightly higher than the grain rates. The 41.5 cent local rate from Peoria to New York is the rate from Chicago to New York, to which is added an arbitrary proportion known as a specific (Tr. 101). The specific from Peoria to Chicago, I believe is 11.5 cents, and the factor east of Chicago is 30 cents. That is the way the 41.5 cent rate is constructed (Tr. 102).

We do not expect the Commission to change the specific in the local grain rate, constructed on the basis of the specific to Chicago plus the proportion east. We ask the Commission to set divisions with respect to grain and grain products and by-products upon which the eastern lines seek to reduce our earnings by applying the reshipping rates east of Chicago or the connecting line percentages (Tr. 103). If we get the 11.5 cents out of the local rate, we are satisfied. We expect the Commission to make no change where rates are made on the basis of specifics via Chicago or Chicago Junctions, in the manner outlined in I. C. C. Docket 232, where the Illinois lines were permitted to increase the specifics by one cent per hundred pounds (Tr. 104). It does [fol. 59] happen that the specifics are sometimes higher than the local rates and the Commission approved it. We do not expect the Commission to change the divisions in cases where we are getting our specific proportion of the local rate (Tr. 105). We are asking the Commission to make no change in the specific proportion and will take that amount whether it is more or less than the local rate. I do not know what the rate on corn is from Springfield, Illinois, to Peoria. Generally, the specific from interior Illinois territory via an interior junction is 11 cents and Peoria is an interior Illinois junction (Tr. 106). I do not know what the local rate is from Springfield to Peoria. I do not know what the local rate is from Lincoln to Peoria but the specific from Lincoln to Peoria is 11 cents (Tr. 107).

Mr. Connell: How are the rates on grain from Northern Iowa territory to Eastern Trunk Line territory constructed?

Mr. Towner: We are not asking the Commission to divide the rates from any territory west of Peoria. We are asking it to divide the joint through rates from Peoria to eastern destinations, and we do not care anything about rates from territory west of Peoria or from Central Illinois to Peoria. (Tr. 108). I showed Northern Iowa territory on Exhibit 14 because it was outlined in the tariff introduced as Exhibit No. 1 (Tr. 109). When a car of grain is tendered to the Alton at Peoria we do not know where it comes from. We have no way of ascertaining where the shipment started.

Examiner Smith: Is it not the fact that nobody knows anything at all about it until the shipper intends to match up his inbound billing?

Mr. Towner: Even then there is no assurance that the shipment outbound is the exact shipment covered by the billing inbound (Tr. 111). The tariff does not require it.

[fol. 60] The Witness: As I explained, to secure the benefit of the so-called proportional rates, designated in Exhibit 12 as Trans-Mississippi River, Northern Iowa, Illinois-Iowa and Northwestern, the shipper at the time of the movement of the shipment from Peoria, surrenders an inbound freight bill covering a shipment originating in any one of those particular territories and predicated on that surrender of the billing the rate is based (Tr. 112). The outbound rate is not dependent on the inbound rate or the territory in which the shipment originated.

On page 5 of Exhibit 12 I show three proportional rates, 32 cents, 30.5 cents and 30 cents. If a shipper surrenders billing in accordance with transit regulations covering a shipment originating within the boundaries of Trans-Mississippi territory, he would get the 32 cent rate. If on the same shipment he had surrendered billing covering the shipment from Northern Iowa, he would have received the 30.5 cent rate (Tr. 113). If on the same shipment he had surrendered billing on a shipment which originated in Northwestern territory, he would have gotten the 30 cent rate. Three rates could be applicable to one shipment. The rate from Peoria would be that rate attaching to the territory from which the inbound tonnage billing was surrendered. We have to have the original of an inbound ship-

ment before we can bill an outbound shipment but they are not the same shipments (Tr. 114). Transit operations are based upon the application of rates from origin to destination and the rates in effect as of the movement of the shipment to Peoria would be applied to the entire movement. Outside of that there is no reason for referring to the points from which the shipment first came (Tr. 115). A shipment of grain to Peoria from Northern Iowa would move to Peoria at a local rate. The car is switched to the plant, unloaded and released. The shipper pays a freight bill covering the charges from point of origin to Peoria and [fol. 61] the inbound transaction is ended (Tr. 116). When the inbound car is unloaded the transit bureau at Peoria is notified in writing and within 10 days the inbound paid-freight bill is surrendered to the bureau. When the outbound shipment is made the shipper prepares transit shipping directions containing all information appearing on the bill of lading. He also refers to the billing of an inbound car, the whole weight or part of which he wishes to apply against the outbound shipment. These shipments are given the bureau which verifies the rates and makes a record so that the same inbound tonnage may not again be used by the shipper. A copy of the directions, verified by the bureau, is given to the railroad agent, who bills the shipment from Peoria. A new bill of lading is issued on the outbound movement (Tr. 117). No refund is made on the inbound shipments. The local rates from Northern Iowa points to Peoria are collected and retained by the inbound carrier, even though the shipment moves out of Peoria on the reshipping rate. I do not know what percentage of the Alton traffic out of Peoria is brought into Peoria by it. We handle very little traffic to Peoria (Tr. 118). We might bring in grain originating at Missouri points in Trans-Mississippi River territory on our line running from Kansas City to Louisiana. I do not know how many of the 6,500 cars shown in Exhibit 13 originated on our railroad. We are asking the Commission to change the divisions on a car originating on our railroad and brought to Peoria and reshipped from there. The present rate from Kansas City to New York is the rate to Peoria plus the reshipping rate outbound (Tr. 119). The rate to Peoria would be whatever rate happened to be applicable. It would most likely be a proportional rate on the west

end and a local rate on the east end. We collect local rates on shipments to Peoria when the local rate has application. There might be a number of rates from Kansas City to Peoria, dependent upon the origin of the grain. In any [fol. 62] event, the rate to Peoria would be 2 cents less than the rate to Chicago and 2 cents higher than the rate to St. Louis, and the rate from Peoria to New York would be 2 cents higher than the rate from Chicago to New York (Tr. 120). A shipment from Kansas City to Peoria would be stopped at Peoria and the charges paid on the basis of the rate to Peoria, which would be the local rate. If on a shipment from Peoria to New York, on which the reshipping rate was assessed, billing was surrendered covering the shipment from Kansas City to Peoria (Tr. 121), the reshipping rate from Peoria to New York would be applied. It is the division of that rate that we want the Commission to fix in this proceeding. 20% of that rate of 32.5 cents would be 6.5 cents; that is 20 per cent of the grain products rate of 32.5 cents (Tr. 122). I assume that if we handled grain from Kansas City to Chicago we would get 2 cents more than if we handled the same grain to Peoria. The rates are made so that the combination of a rate to the primary markets, Chicago, St. Louis or Peoria, plus a rate outbound to a given destination, such as New York, equals one specific sum. For years prior to 1920 the rates to Chicago from the Missouri River were 3 cents higher than the rates to St. Louis. The rate to Peoria was 1½ cents over St. Louis and 1½ cents under Chicago (Tr. 123). The outbound rates were the same differences as the inbound rates. Since 1920 the 3 cent spread has been changed to 4 cents and Peoria takes 2 cents under Chicago and 2 cents over St. Louis. Assuming that the rate to Peoria from Kansas City is 12 cents and that the rate to Chicago is 14 cents, if the grain goes into transit at Peoria the Alton wishes to keep the 12 cents for the haul from Kansas City to Peoria and prorate the reshipping rate of 32 cents from Peoria to New York with the eastern lines (Tr. 124). The Alton should not take the 14 cent rate as our division because the transactions are separate. We would haul such a shipment to Peoria because the shipper told us to do so. If the shipment in the first instance was [fol. 63] billed from Kansas City to Chicago we would get the rate from Kansas City to Chicago, which would be 2

cents higher than the rate to Peoria and which has no relation in that respect to the Peoria rate (Tr. 125). We do not want to start a new shipment from Peoria on traffic transited there and later billed out to Eastern Trunk Line territory (Tr. 126). Very little grain handled by the Alton from the Missouri River goes into transit at Peoria. A greater percentage of grain originating on the Alton in Illinois goes into transit at Peoria, but I do not know the amount (Tr. 127). We would not prefer to handle Illinois grain originating on the Alton to Chicago on the basis of the specifics. I was dealing with the division of the local rates from Peoria. Springfield, Illinois, is a point on the Alton. The rate from Springfield to New York is made on the basis of the specific to Chicago added to the reshipping rate from Chicago. We are asking for no change in the division of that rate, but will continue to handle the traffic direct to Chicago (Tr. 128).

Mr. Towner: It makes a difference whether or not such a shipment goes through Peoria because the rates that we are attacking in this proceeding are the rates from Peoria to the east. If the shipment does not go through Peoria we are not attacking it.

The Witness: If a man at Springfield routed a shipment over our rails to Chicago, via Peoria, he would pay for the additional service and the rate from Springfield to destination would be applied (Tr. 130). The difference between our rates from Springfield to Chicago, via Peoria and via the direct line to Bloomington, is 2 cents. There is an additional charge of 2 cents per hundred pounds if it moves through Peoria. We have a direct route from Springfield to Chicago. If a man wanted to route a car from Peoria to Chicago, we would make a charge applicable to indirect hauls, which, as I recall it, is 2 cents. That movement would not contemplate transit at Peoria. From Springfield to Chicago by way of Bloomington is 185 miles. From Springfield to Chicago via Peoria is 218 miles (Tr. 131). We are [fol. 64] not attacking the division of the rate from Springfield to Eastern Trunk Line territory. On a shipment from Springfield to Peoria and then to Chicago we apply the Springfield-Chicago rate via Peoria, which would be the Springfield-Chicago rate plus a charge for the back haul. We would permit transit on that operation but would make

an out-of-line charge (Tr. 132). The charge is provided for in our Milling in Transit Tariff No. 1570 and I think is 2 cents per hundred pounds. We do not ask the Commission to set the division on traffic from Springfield to Eastern Trunk Line territory (Tr. 133). On a shipment from Springfield to Peoria where it goes into transit and later moving from Peoria through Chicago to New York, we are not asking the Commission to set the divisions from Springfield to Eastern Trunk Line territory. We are asking them to fix the divisions from Peoria and Pekin (Tr. 134). If a car of grain moved from Southern Illinois to Peoria and went into an elevator and thereafter moved out to New York City over the Alton, we are not asking for a division of the through rate on that car. It would be handled on the through rate from point of origin to destination and not on the rate from Peoria or Pekin to destination (Tr. 135). There is a through rate in effect from Southern Illinois to New York which would be applied to that shipment. The rate from Peoria would not be in any way involved (Tr. 136). By Southern Illinois I mean Illinois south of St. Louis, generally speaking. My answer would apply to a movement from Springfield as well as from a point in Southern Illinois. It would also apply to any point where there were through rates in effect to Eastern Trunk Line territory via Peoria. I would say that the vast majority of Illinois is covered by such joint through rates (Tr. 137). Some stations may not be covered but they are in the minority. I cannot point out any of those places, but if there are any and the traffic from Peoria moves at the proportional rate applying when billing is surrendered from Illinois-Iowa territory, that traffic would be involved. The Commission [fol. 65] would not have to hunt these things up because it is only asked to deal with the division of the rate from Peoria. The questions go back of Peoria and bring into issue the rate to Peoria which is not involved in the case (Tr. 138). We only ask the Commission to fix the division of the rates from Peoria. I said that traffic moving on joint through rates from points in Illinois to Eastern Trunk Line territory is not here involved. I have not gone to the trouble to ascertain what the rates are so far as Illinois origin territory is concerned (Tr. 139).

Mr. Towner: What we are asking the Commission to divide are the rates from Peoria. If I am wrong in the legal

premise for this complaint, Mr. Connell is obviously right. My legal premise is that the shipments from Peoria moving on a reshipping or proportional rate are brand new shipments and that it does not make the slightest difference whether they move from Podunk or Squeedunk, or any place else, into Peoria. If I am wrong in my legal premise that the shipment from Peoria moving on the reshipping or proportional rate is a new shipment, then the case fails. We do not care about the point from which the traffic moves into Peoria and made no investigation of it (Tr. 140).

The Witness: We do not expect the Commission to give any consideration in this case to the revenue of the Alton for hauling traffic into Peoria, as that is not involved in the proceeding. The specific from Springfield to Peoria is 11 cents (Tr. 142). The reshipping rate from Chicago on grain, which is added to the 11.5 cents is 30 cents, making a total of 41.5 cents from Springfield. The reshipping rate on grain from Peoria is 32 cents (Tr. 143). The combination of the specific to Peoria, plus the reshipping rate from Peoria, would be 43 cents, 1½ cents higher. I do not know what the local rate is from Springfield to Peoria. We are not asking the Commission to fix the divisions of the through rate applying on a shipment from Springfield to New York via Peoria. A shipment originating at Springfield (Tr. 144) and moving to New York via Peoria would move on the [fol. 66] through rate (Tr. 145). Such a shipment would always move under the Springfield-New York rate and I do not see how it would come into the complaint.

Mr. Towner: What we are complaining of here are the divisions accorded the Alton on grain, grain products and by-products of grain moving from Peoria and Pekin (Tr. 146) to Eastern Trunk Line territory. The only effect of the origin territory is to determine the application of the outbound proportional rate, which for some reason seems to vary, depending upon the origin territory of the grain covered by the billing which is surrendered (Tr. 147).

The Witness: A shipment moving from Kansas City to Chicago and thence to New York, transited at Peoria, would not be involved in this case (Tr. 148). We are not asking the Commission to divide the rates from Kansas City to New York (Tr. 149).

Examiner Smith: As I understand the case, all that is asked for is a division of the rates that apply on reshipped grain, grain products and grain by-products from Peoria to Eastern Trunk Line territory.

Mr. Towner: I would add to that that we also ask the Commission to pass upon the divisions of the rates from Peoria applying upon the so-called local traffic originating at Peoria (Tr. 150).

The Witness: There may be joint through rates from points in the Northwest to Eastern Trunk Line territory, but that is not a question at issue in this case. I say that it is not important to know what traffic would move from the Northwest through Peoria since what is important is the division of the revenue on the traffic that does move on proportional rates from Peoria. I don't know what proportion of the traffic moves in that fashion. I could not tell you the proportion of the 6500 cars to the other traffic, but I can say that a very important traffic moves from Peoria under those rates (Tr. 152). Some of it comes from [fol. 67] the Northwest but I do not know how much. It would be a good proportion. The Alton wants that traffiic and solicits it as do all of the eastern lines every day. All of the eastern lines having headquarters at Chicago solicit the traffic. The Baltimore & Ohio, the Pere Marquette and Grand Trunk solicit it but none of them have rails to Peoria (Tr. 153). They are dependent on some Peoria-Chicago line to transport it to Chicago so that they can get it. They have no Chicago-Peoria lines.

The purpose of Exhibit 16 was to show that the Alton forms part of a direct route from Peoria to the east via Chicago, Joliet and Dwight. On this exhibit I have taken an almost impossible route in an effort to reduce mileage; that is, the route to Suspension Bridge, New York, via the Toledo, Peoria & Western, via Effner, Pennsylvania, via Logansport, the Panhandle, via Butler, the Wabash, via Detroit, and the Grand Trunk to Suspension Bridge (Tr. 154). The mileage on that route is 613 miles. From Peoria, the Alton with the Elgin, Joliet & Eastern and Wabash has a mileage of 630 miles. The Nickel Plate, Detroit & Toledo Shore Line and Michigan Central mileage is 677 miles. To Buffalo, the Alton via Dwight, New York Central via Knox and the Nickel Plate shows a mileage of 629 miles, only slightly in excess of the route via the Toledo, Peoria & West-

ern. I took Suspension Bridge and Buffalo as the two most important junction points at the western termini of the trunk lines. The routes through Buffalo and Suspension Bridge are greater than those through Pittsburgh. All the rates to Eastern Trunk Line territory are made with relation to the rates to New York (Tr. 155). New York is a base point.

On Exhibit 15 I showed our switching absorptions at Peoria to show how little revenue we receive on this traffic. The car covered by the second sheet originated at Peoria and moved on the proportional rate in accordance with the [fol. 68] tariff provisions (Tr. 156). I do not know whether the grain was grown in Peoria but we apply the proportional rate. It may or may not have come into Peoria from some other point. We applied a rate of 26 cents which applied from Peoria. None of the sheets in Exhibit 15 showed the original point of origin of the grain (Tr. 157). Billing was surrendered on it but I cannot tell you where it came from. The shipment was one of feed from Peoria but I don't know where the grain came from that went into the feed. The switching of $6.55 shown accrued on the outbound shipment at Peoria. I cannot give the detail of the figure. It was most likely a shipment that originated on the Rock Island and there was involved both the charge of the Peoria and Pekin Union and the Rock Island (Tr. 158). A large mill of the American Milling Company is located on the Rock Island with which we have no direct connection. There would be applied a switching charge of the Rock Island to the Peoria & Pekin Union and an intermediate charge of the Peoria & Pekin Union from the Rock Island to the Alton (Tr. 159). If the Rock Island handled a shipment from Kansas City to Peoria, the shipper would pay the rate from Kansas City to Peoria and that would end the inbound transaction. The expense bill covering the inbound shipment would be given to the Transit Bureau at Peoria. The other part of the picture is the movement from Peoria to New York via the Alton, which would consist of feed. There is no indication or proof that the feed contained any part of the grain shipped from Kansas City to Peoria (Tr. 160), but in making the shipment from Peoria the shipper could refer to the inbound billing of the Rock Island from Kansas City to Peoria and cancel that tonnage in order to secure the benefit of the Trans-Mississippi

River rate on the feed from Peoria to New York. The shipment would be handled on two factors, one from Kansas City to Peoria and one from Peoria to New York (Tr. 161). Grain shipped over the Rock Island from Kansas City to [fol. 69] Peoria would be put in transit at Peoria under a Rock Island tariff. The transaction ends at Peoria when the grain goes into the mill or the elevator. A carload of feed manufactured at Peoria would travel from Peoria to Eastern Trunk Line territory under a rate published in a tariff of the Central Freight Association by Agent Jones, to which tariff the Alton is a party. That tariff, in combination with the tariff covering transit at Peoria, would entitle the shipper (Tr. 162) upon surrendering the inbound tonnage, to a proportional rate from Peoria to destination, dependent upon the territory from which the inbound tonnage moved. It is a tariff of the Alton and the eastern lines that carries that shipment from Peoria to destination. The movement into Peoria on the Rock Island is a local proposition and the transportation, so far as the Rock Island is concerned (Tr. 163) is there ended. The balance of the proposition is covered by the tariffs of the Alton and the eastern lines. The Rock Island assesses and retains the local rate to Peoria. If the Alton originated a shipment at Springfield, Illinois, the transit at Peoria would be handled under a joint transit tariff published by agent Jones (Tr. 164). A shipment of grain from a point on the Burlington west of the Mississippi River would move to Peoria under a local rate published by the Burlington. The charges would be collected on the basis of the local rate and the shipment would end. Neither the Burlington, the Rock Island nor any other western road makes any provision in its tariffs covering the transit privilege (Tr. 165). On traffic moving from west of the Mississippi River into Peoria, the inbound revenue is not shrunk when the grains move out after milling. There is a distinction between transit allowed on a through rate and the situation that obtains on the traffic under consideration (Tr. 166). On a shipment moving under a through rate the question would be one of divisions via the transit point. In this case we are asking for a decision as to what we should receive out of the rate from Peoria, not a di- [fol. 70] vision of the rate. In showing the switching charges at Peoria, we are asking the Commission to take into consideration the terminal expense to which the Alton

is subjected, even though we may not participate in the inbound movement to Peoria. I will leave it to the Commission as to how far they should go in considering these absorptions (Tr. 167). I think the Commission should also consider our switching absorptions at Chicago and would not object to a consideration of the switching absorptions of the eastern lines. I do not mean to say that all of the points of origin covered by Exhibit 1 are origin points in this complaint. The exhibit, however, includes Peoria and Pekin, which are the origin points involved in this complaint (Tr. 168). They are the only origin points involved. On page 174 of Exhibit 1 are shown rates on grain products from Peoria to New York as follows: Trans-Mississippi 32.5 cents; Northern Iowa 31 cents; Illinois-Iowa 32.5 cents; Northwestern 30.5 cents. That information is also shown on page 5 of Exhibit 12 (Tr. 169).

S. P. Henderson was thereupon called as a witness for complainants and, being duly sworn, testified as follows:

I am Chief Operating Officer of The Alton Railroad and have held that position since the first of the year. I have entire control of the physical operation of the road (Tr. 170). Prior to the first of the year, I was General Superintendent of the entire line and held that position for two years. Prior to that I was Division Superintendent of the Eastern Division, which includes the Illinois lines. I am familiar with the connection of the line of the Alton from Peoria via Washington and Dwight, through Joliet and Chicago. Between Peoria and Dwight it is a branch line of like construction, with some grades. From Dwight to Chicago it is main line. The Alton has another line extending from Peoria to Springfield, via San Jose, which is also a branch line. It hooks up with the main line at Springfield. The main line of the Alton is double track with a .3 per cent grade the majority of the way and we think is pretty good [fol. 71] railroad (Tr. 172). I have the gross ton miles handled one mile on the Alton for 1928. Between Dwight and Peoria through Washington we handled 151,245,673. For the main line in the same period we handled 5,439,617,000 gross ton miles one mile. We handled nearly 50 times

as much on the main line. The branch line distance from Peoria through Washington to Dwight is 81 miles. It is 37 miles from Dwight to Joliet and 74 miles from Dwight to Chicago. I have some figures with respect to relative efficiency of operation on the Alton, currently, as compared with previous periods (Tr. 173). In the first six months of 1929, as compared with the first six months of 1921, we had a 56 per cent increase in average gross ton miles per train hour. In 1921 the figure was 14,881 and in 1929 was 23,214. Our freight train miles per hour in 1921 were 11.7 and in 1929 were 15.3. In 1921 our average cost per freight train mile, transportation only, was $1.05 and in 1929, 86.1 cents. In 1921 our average gross train load was 1,274 tons, and in 1929 it was 1,521 tons. In 1921 our average locomotive expense per locomotive mile, all classes, was 56.7 cents and in 1929 was 46.3 cents. That transportation expense does not include repairs, depreciation and retirements. In 1921 our roundhouse expense was $16.27 per locomotive and in 1929 it was $11.92 per locomotive. That shows a steadily decreasing cost of operation. Everything possible has been done to produce efficiency in operation. The Alton is now in the hands of receivers and in my judgment is being operated as efficiently as it could be operated under the system. In 1929 our operating ratio was 75.5 (Tr. 175) and that was produced with a decreased gross revenue. The Alton is one of the oldest railroads in Illinois and serves a very large local territory. It runs diagonally through the middle of the state with a line to Peoria on one side. It is an extremely important railroad to the people of the State of Illinois (Tr. 176). We find that out when we try to take off some passenger trains for example. Before I was with the Alton I was with the Lackawanna, the Kansas City [fol. 72] Southern and the Chesapeake & Ohio Railway in the operating departments, and during the course of my railroad experience have had occasion to become familiar with operations conditions upon the railroads east of Chicago and north of the Ohio River. I have traveled over those railroads a great deal (Tr. 177). Generally speaking, in my opinion the operating conditions on the lines east of Chicago are better than those on our branch line from Peoria to Dwight. That is a small branch line with a grade

of 1.15 per cent and is difficult to operate. There is no great difference in the operating difficulties on the lines east of Chicago as compared with the main line of the Alton. The main lines of the New York Central, Pennsylvania, Nickel Plate and Baltimore & Ohio are far better, of course (Tr. 178). On the New York Central, for example, the operating conditions are far better than the Peorgia-Dwight branch, but I do not know that they are as compared with the main line of the Alton. The New York Central has better facilities. That would also be true of the other principal carriers operating into eastern territory from Dwight and Joliet (Tr. 179). I would conclude that on the whole there is no great difference in operating conditions east and west of Chicago, as between the main line of the Alton in Illinois and the main line of the chief carriers operating to the east.

Cross-examination:

I do not have any figures showing gross ton miles per mile of road. There is a comparison, however, between gross ton miles handled one mile on the Peoria-Dwight line and the gross tons handled one mile on our entire main line, as there are so few tons handled on the Dwight branch. The figure that I gave of 5,439,000,000 is the total (Tr. 180) handled on the main line for 1,000 miles. Our branch *branch* from Peoria to Dwight is 81 miles, so that our main line figures ought to be several times as great because of the greater mileage (Tr. 181). I do not think it is efficient operation for a railroad to handle traffic and pay out $6.50 [fol. 73] per car for handling it. I would not handle it if I had anything to do with it. I have nothing to do with the Traffic Department. A railroad has an operating division and a traffic division, whether it is in receivership or not. I am not undertaking to testify as to the efficiency of the traffic department (Tr. 182). I am generally familiar with the main line of the Baltimore & Ohio east of Youngstown, Ohio, and with the line of the Pennsylvania east of Alliance, Ohio. I would not say I am familiar with the Pennsylvania line east of Pittsburgh, but I have been riding over it. I said that my general opinion was that operating conditions are better on the lines east than on the Alton in Illinois (Tr. 183). I meant that the operating conditions are better

than on the branch line of the Alton between Peoria and Dwight. Our maximum grade on that line is 1.15 per cent and we doublehead some of our trains. I think the main line of the Alton has a better grade line than the main line of the Pennsylvania east of Pittsburgh. I don't know how the cost of handling tonnage would compare. I do not know what it costs the Pennsylvania to handle tonnage on that line (Tr. 184). My testimony was based upon impressions that I gained from riding over the eastern lines in passenger trains. I have never had anything to do with the operation of those railroads. I do not know what their maximum grades are, the tonnage ratings of their locomotives or the miles of curves. The Alton has no tunnels on its line (Tr. 185). I have observed some tunnels on the eastern lines but none on the New York Central. I remember the New York Central as having a beautiful grade line all the way. They advertise it as a water level line. I think the New York Central has four tracks east of Buffalo and two and three west of Buffalo. I do not know how many the Pennsylvania has but I think the Baltimore & Ohio has two.

[fol. 74] Alex Grant was thereupon called as a witness for complainants and, being duly sworn, testified as follows (Tr. 186):

I am General Superintendent of Car Service of The Alton Railroad and have been on that job since 1926. Before that I was Assistant to the Chief Operating Officer. I have jurisdiction of the furnishing of equipment to shippers of the Alton. The local distribution is made from Bloomington.

I am familiar with the traffic under discussion in this case. It requires a very high grade of equipment (Tr. 187). In fact it requires the highest type of box car known. It requires practically a flour car. The traffic has to be loaded in a car with no imperfections on the inside. We must be very particular about patches and oil spots on the floor because most of the commodity is sacked feed which is loaded warm. A car might be in condition to load grain in but the heat of the sacked feed draws the oil up and it ruins it. Because of this circumstance we have

to hold a sufficient amount of equipment at Peoria to protect it (Tr. 188). When we get a car good enough for the traffic we have to hold that car. I have made some check of the figures and the period of time that we have to hold these cars will average from 9 days to as much as 15 days. I made my check for a full month. A lot of this feed is shipped in January and the detention would be greater then than during the summer months. We have never been able to plan exactly on the amount of this traffic and we have to hold the cars to protect it. The Alton sustains that burden alone because of its service as an originating carrier in the handling of the traffic (Tr. 189). The average detention figures run from 10 days to about 15 days. That is the entire time on the road and includes the time the car is in the hands of the switching carrier for loading. The Alton pays a per diem reclaim on all this traffic switched by the Rock Island and Peoria & Pekin Union. That reclaim is an arbitrary figure. The arbitrary for the [fol. 75] Rock Island is 3.51 days and the arbitrary for the Peoria & Pekin Union is 3.21 days (Tr. 190). That means that we allow those roads the $3.00 and a fraction over on every car that is loaded on either of them. $3.51 is paid to the Rock Island and $3.21 to the Peoria & Pekin Union. I separate the two reclaims. On a shipment originating on the Rock Island the reclaim would be $3.51, and if the shipment originated on the Peoria & Pekin Union it would be $3.21 (Tr. 191). We hold our own cars and the equipmet of the eastern lines for this traffic. I don't know just what percentage of the cars are ours but it could be figured out (Tr. 192). I could not say without a check how many Alton cars were in the business from May 22 through August. We furnish our own cars so far as we can, even though the shipments are destined to eastern points, but I cannot give the exact figures. We call upon the eastern lines for empty cars for this traffic almost continuously (Tr. 193). The traffic is very heavy and we could not expect the Alton to have enough equipment to let it go east and be gone over that time and still protect the mill. Most of the traffic is feed from the American Milling Company. I think they call it grain products. When we get cars from the eastern lines we take them to Peoria and hold them until the shipments are ready (Tr. 194). We hold them until they are ordered and pay per

diem on them. Those roads in turn pay per diem on our cars on their lines. The reclaim I spoke of is the regular switching reclaim at Peoria which every switching road is supposed to get to protect them from per diem for the time a car is on their line. If we give the P. & P. U. a car to be loaded, we would allow the 3.21 days, slightly in excess of 3 days. That is to allow them time to take the car (Tr. 195), have it loaded and bring it back. They would not do the same thing to us as we do not do any switching at Peoria. We have no terminal there. That would apply at some other points where we do switching. We do no switching at Peoria either but we do at other points [fol. 76] where the Alton and other western roads serve industries jointly. The arrangement is supposed to offset itself at each terminal. The entire proposition is to make a road whole on the per diem, not to offset one terminal against another. It is to protect the switching road on the per diem. We have the same rule at every point including Chicago. At Peoria the Alton uses the terminal facilities of the Peoria & Pekin Union Railway (Tr. 197). I do not think we have any rails in the Peoria switching district at Peoria (Tr. 198).

Mr. Towner: I will admit that we have an agreement with the Peoria & Pekin Union Railway and that its terminals constitute the terminals of the Alton. Our railroad from the south ends at Grove, which I think is right on the margin of the Peoria-Pekin switching district. We connect there with the Peoria & Pekin Union. Our north line extends to Washington and from Washington to Peoria we operate over the main line of Toledo, Peoria & Western (Tr. 199).

Redirect examination:

It makes no difference to the Alton whether it holds its own equipment for this traffic or the equipment of some other road. Our cars are worth as much as those of any other line. If we hold somebody else's car we pay $1 a day and if we hold our own car it is of equal value and is out of service also. Reclaim is allowed to the switching lines so that it will not have to pay per diem and when we allow a three-day reclaim to the Peoria & Pekin Union that means that the Alton pays three days' per diem on a

foreign car (Tr. 200), if it moves over the P. & P. U. There is no way that we ever get that per diem back from anybody. There is no equalization of that reclaim.

Mr. Towner: This is all of the evidence that we now have here (Tr. 201). I will have further evidence available shortly which I will desire to put in.

[fol. 77] Examiner Smith: I understand that the defendants are willing to proceed and let you put in the other matter that you refer to when you get it.

H. L. Baird was thereupon called as a witness for defendants and, being duly sworn, testified as follows (Tr. 202):

I am Assistant General Freight Agent of the New York, Chicago & St. Louis Railroad Company and am a member of a committee appointed by the Central Freight Association lines to present the defense to this complaint. I am testifying for all of the defendants. I am familiar with the complaint in this case and understand that it seeks a division of the reshipping rates on grain, grain products and by-products of grain from Peoria and Pekin, Illinois, to destinations in Eastern Trunk Line territory (Tr. 203). I have investigated the history of those lines. The domestic reshipping rates on those products from Peoria vary according to the territorial origin of the commodities, there generally being four sets of reshipping rates from Peoria; first, when originating in Trans-Mississippi River territory, which is territory west of the west bank of the Mississippi River, except points in the northwest, in Northern Iowa and Illinois; second, when originating in the northwest, including Wisconsin, the upper peninsula of Michigan, western Canada, Minnesota, North and South Dakota and other northwestern states, except certain points in Northern Iowa territory, and also except certain traffic routed via Missouri River crossings and included in Trans-Mississippi River territory; third, when coming from Northern Iowa, including some stations in Southern Minnesota; fourth, when from certain points in Illinois and points in Iowa on the Mississippi River. For many years the rates on grain products from St. Paul, Minneapolis, etc. to North Atlantic Seaboard territory were through joint rates which also applied for a time on other commodities (Tr. 204). When joint rates

did not exist the traffic was handled on rates to and from Chicago, Milwaukee, Peoria, etc. There were no through [fol. 78] rates on wheat and the invariable practice was to handle that traffic on rates to and from Chicago, etc. On February 1, 1910, the railroads discontinued the application of the east bank Mississippi River combination on grain products from Trans-Mississippi River territory to North Atlantic Seaboard territory and established reshipping rates east of Chicago, Peoria and East St. Louis on those commodities. The reshipping rates were established from Chicago as the base point and the rates from Peoria and East St. Louis were made 1.5 cents and 3 cents per 100 pounds respectively over the Chicago rate. The present differentials are 2 and 4 cents over the Chicago rate from Peoria and East St. Louis respectively. The differentials by which the Peoria and East St. Louis rates now exceed the Chicago rates represent the difference between the rates from the Missouri River to Peoria and East St. Louis (Tr. 205) and the rates to Chicago. The effect is to equalize the rates via Chicago, Peoria and East St. Louis upon shipments from the Missouri River. On grain and its products the Missouri River crossings were the base points from which the rates to North Atlantic Seaboard territory vie Chicago, Peoria and East St. Louis were equalized, and this arrangement was applied by the eastern carriers on the same commodities from Trans-Mississippi River territory. On February 28, 1920, the joint through rates on grain products and the other grains from St. Paul, Minneapolis, Duluth, etc., to North Atlantic Seaboard territory were cancelled and the traffic has been handled on the rates to Chicago, Milwaukee, Peoria, etc., plus the reshipping rates established from those points to the North Atlantic Seaboard territory. These reshipping rates from Chicago to New York and other eastern points were and are the same as those applied east of Chicago on like traffic from Trans-Mississippi River territory. On grain and its products from Mississippi River and Illinois points and western Indiana, through rates continue to prevail, made up of specifics from the origin points to Chicago, plus specifics east thereof (Tr. 206). The specifics east of Chicago from these [fol. 79] points are the same as the reshipping rates applied on the same traffic from Trans-Mississippi River and Northwestern territory. By this change the carriers established

a uniform division or rate basis east of Chicago on grain and grain products originating at all points northwest and south thereof. From all points in Central Freight Association territory east of the Indiana-Illinois State Line and Lake Michigan the rates continue to be made on rate groupings. The present reshipping rates applying east of Chicago on grain and its products from points northwest and south thereof are based upon those effective February 1, 1910, with the increases and reductions authorized by the Commission and the Railroad Administration and those voluntarily made by the carriers since Federal Control. To equalize the Chicago rates, the proportional rates on grain and grain products from the northwest, from Peoria on grain have for the past 20 years been the same as from Chicago (Tr. 207). These rates were published shortly after March 29, 1905, the authorization for them stating that effective April 6, 1905, on traffic from northwestern points which was not subject to the Mississippi River rate basis, the rates or proportions of rates in effect from Chicago to eastern destinations would also apply from Peoria upon shipments routed via the Toledo, Peoria & Western and railroads operating south thereof. It was also arranged that the foregoing rates would only apply when the rates charged from the northwestern points to Peoria were identical with those in effect on like traffic to Chicago. The oldest tariff I could find naming proportional rates from Peoria ex-Northwest, was Lake Erie & Western Railroad tariff No. 1470, effective April 1, 1907, naming a proportional rate on grain of 19.5 cents to New York, subject to a note which provided that the rates would apply on traffic from the northwest on which no through rates were in effect and upon which the rates to Peoria were the same as those on like traffic to Chicago (Tr. 208). The rates applied from Peoria during the past 20 years, and now in effect, are equalizing [fol. 80] rates in the strict sense and are published to equalize the Peoria gateway with the Chicago and St. Louis gateways and thus permit the application of equal through aggregate rates from point of origin to destination, regardless of the gateway through which the traffic moves, the ex-trans-Mississippi rates equalizing to Peoria, Chicago and St. Louis with the ex-northwest and ex-Northern Iowa rates equalizing the Peoria and Chicago gateways.

Cross-examination:

I said substantially that the proportional reshipping rates from Peoria vary as to the originating territory (Tr. 209). I realize that the inbound billing surrendered upon the making of the outbound shipment is what determines the application of the outbound rate as between the four rates I have described. I think, however, that is a very technical argument. The volume of the outbound rate is finally determined by the character of the billing surrendered. I understand that it is impossible to retain the identity of the particular grain (Tr. 210).

Frank J. Van Overstraeten was thereupon called as a witness for defendants and, being duly sworn, testified as follows (Tr. 211):

I am Chief Percentage Clerk for the New York Central and am testifying here for all of the defendants. Before coming to the New York Central I was with the Chicago, Rock Island & Pacific nine years, and am familiar with the issues involved in this case (Tr. 212).

The purpose of my testimony is to show what extent the Alton participated in through rates that were in effect from the northwest to points east of the western termini of the Eastern Trunk Lines and the divisions applied to Chicago in connection with these rates. I will refer only to through rates from the northwestern territory to eastern territory.

Mr. Towner: I will have to object to that testimony [fol. 81] for the reason that we have not attacked the divisions of the joint through rates via Peoria (Tr. 213).

Mr. Connell: As I understand it, the witness is going to talk about the through rates comprised of the local into Peoria, plus the reshipping rate out (Tr. 214).

The Witness: I am going to also discuss the Peoria reshipping rates when from the northwest. From October 1, 1909, to January 20, 1915, I. C. C. Tariff No. A-61 covered rates on oats and barley from Ashland, Wisconsin, Minneapolis, Minnesota, etc. to New York of 22.5 cents on domestic traffic and 20.5 cents on export traffic. Effective January 20, 1915, the rates of 22.5 cents and 20.5 cents were

increased respectively to 23.3 cents and 21.2 cents. On April 1, 1915, in Supplement 20 to Tariff I. C. C. No. A-201, the rates were restricted so that they would not apply via the Alton through Chicago and Chicago Junction points. This limitation remained in effect until March 22, 1918, when the rates were cancelled and the combination of locals became applicable. The rates in effect from October 1, 1909 to March 22, 1918 divided by allowing the lines north or west of Chicago the same proportion as applied north or west of Peoria or 7.5 cents per hundred. That was true of the joint through rates I spoke of. Effective between October 1, 1909 and February 1, 1910, the rates on corn from Minneapolis, etc. to New York, were 24 cents on domestic traffic and 20.5 cents on export traffic. This rate was divided by allowing the lines north or west of Chicago the same proportion (Tr. 216) as north or west of Peoria, or 7.5 cents per hundred. This also was a joint through rate. Effective March 1, 1909, the rate on grain products from Minneapolis, etc. to New York was made 25 cents, which remained effective until January 20, 1915, when it was increased to 25.8 cents. This rate remained in effect until March 25, 1918, when it was increased to 28.3 cents. On January 25, 1918, it was increased to 34.5 cents. On February 28, 1920, the rates on grain products were can- [fol. 82] celled and the combination of locals became applicable. The rates of 25 cents and 28.3 cents divided by allowing the lines north or west of Chicago (Tr. 217) the same proportion as applied north or west of Peoria, or 8.3 cents per hundred. These rates were also joint through rates. I have tried to bring out in this testimony that in dividing these rates the proportion to Chicago and Peoria was the same. Effective December 31, 1919, the reshipping rates via the Alton from the northwest were restricted to only apply via Chenoa, Illinois, and junctions south thereof. The reshipping rates on grain products from Peoria were restored on August 1, 1922, but the restriction against applying the Peoria reshipping rates on grain and grain products, except via Chenoa and junctions south thereof remained in effect (Tr. 218). The Chicago reshipping rates are the minimum proportions for the lines east of Chicago and all the through rates are built on the Chicago combination. The Peoria reshipping rates were only pub-

lished as an equalizing factor for the benefit of the Peoria eastbound lines such as the Toledo, Peoria & Western and the railroads operating south thereof. My first exhibit is a statement of billing illustrating the nature of the shipment involved, originating in trans-Mississippi territory, receiving transit at Peoria and destined to points east of the western termini of the Eastern Trunk Lines. It showed the points of origin, tonnage on the inbound billing matched against the outbound billing, Peoria waybill reference, destination, commodity, weight, rate and routing (Tr. 219).

(Said document was received in evidence as Defendants' Exhibit No. 18 and is certified to this court.)

My next exhibit is a statement of the billing, showing the nature of the shipments covered originating in the northwest, transited at Peoria and destined to points east of the western termini of the Eastern Trunk Lines. It shows the same information as the previous exhibit.

(Said document was received in evidence as Defendants' Exhibit No. 19 and is certified to this court.)

My next exhibit is a statement of billing (Tr. 220) il-
[fol. 83] lustrating the nature of the shipments originating in Trans-Mississippi River territory, transited at Peoria and destined to points east of the western termini of the Eastern Trunk Lines, on which the Alton received a haul into and out of Peoria. It shows the same information as my previous exhibits.

(Said documents was received in evidence as Defendants' Exhibit No. 20 and is certified to this court.)

My next exhibit is a statement showing the nature of the shipments originating in Northern Iowa, transited at Peoria and destined to points east of the western termini of the Eastern Trunk Lines. It shows the same information as my previous exhibits (Tr. 221).

(Said document was received in evidence as Defendants' Exhibit No. 21 and is certified to this court.)

My next exhibit is a statement of billing, showing the divisional basis used by the Alton on a shipment of flour originating in Trans-Mississipi territory, transited at Kansas City and going to Holyoke, Mass. It shows the origin

of the inbound billing, the Kansas City waybill reference, destination, commodity, weight, rate or proportional applied to Kankakee and charges. It shows there is no question as to divisions, except where the shipment is transited at Peoria. On the shipment in this exhibit the Alton used the Kansas City-Kankakee proportional rate of 17.5 cents (Tr. 222). The amount of 17.5 cents under the rate column on the exhibit represents the rate to Kankakee and that is the division from Kansas City to Kankakee which the New York Central divides with the Alton. That rate is published as the rate to Kankakee. There is a proportional rate from the Missouri River, or Kansas City, to Chicago and it is applied to Kankakee. The 17.5 cents did not all accrue to the Alton (Tr. 223). The New York Central received some of it, as they would haul the shipment to Dwight to Kankakee and beyond to their connection with [fol. 84] the Erie. When the shipment left Kansas City it was destined to Holyoke, Mass., and was a through shipment between those points moving via the Alton to Dwight and New York Central, thence to Kankakee and beyond. It was the same sort of a shipment out of Kansas City as one of the shipments we are now quarreling about moving out of Peoria (Tr. 224). It was a through shipment from the transit point to the east. The exhibit also shows that the Alton recognized that the rate to Kankakee is the proportional rate to Kankakee. It billed it at 17.5 cents. It was willing to participate in the movement to Holyoke on the rate to Kankakee.

These exhibits are copies of the billing on these particular cars and in this case the original waybill was made to the Alton (Tr. 225). The waybill was made from Kansas City. The inbound billing was from Effingham, Kansas, on the Missouri Pacific.

(Said document was received in evidence as Defendants' Exhibit No. 22 and is certified to this court.)

Cross-examination:

I said that the reshipipng rates from Chicago were the minimum proportion that the eastern lines recognized on traffic handled through Chicago (Tr. 226). They apply to any grain or grain products rates on traffic moving through Chicago from the west or northwest and were the least we would take in division of the rates. It was not the policy of

the Traffic Department of the New York Central to take less. The Accounting Department may have done so, I do not know (Tr. 227).

I have looked at Exhibit No. 17 and observe that on page 1 of that exhibit there was a recommendation, joined in by the representative of the New York Central, recommending that via Peoria the New York Central, among other lines, would take the connecting line per cents. These per cents gave less to the New York Central than the Chicago reshipping rate (Tr. 229).

[fol. 85] On the first shipment on Exhibit 18, I do not know that the shipment which moved out of Peoria on the Alton was the same shipment, or part of the same shipment, that moved in on the Rock Island. I presume that the billing shown under the heading "Point of Origin" happened to be billing that was surrendered to the Transit Bureau at Peoria when the outbound shipment was made. I made this exhibit up from the original Alton waybills (Tr. 230). The waybill on the shipment showed the waybills in the first column of the exhibit as being from point of origin. I did not have the waybill covering the inbound movement to Peoria. I had only the Alton waybill. In the case of the first shipment, the molasses was shipped with the feed to mix with the feed. It did not move at the reshipping rate but was included in the carload. Everything else was freight upon which the reshipping rate was applied, except 6,315 pounds (Tr. 231). On the same exhibit the shipment covered by Alton waybill 38 of June 12, 1926, consists of livestock feed. The entire shipment from Peoria was that commodity. 2,246 pounds of it was tonnage for which no inbound billing was surrendered. The balance was tonnage for which inbound billing was surrendered. I saw instances of the same situation in Mr. Behrle's Exhibits (Tr. 232).

Exhibit 19 is similar to Exhibit 18, except that the origin of the inbound billing is different. It covers traffic from the northwest. The third shipment on the exhibit was handled into Peoria by the Northwestern Railway. I do not know whether or not it has rates to Chicago (Tr. 233).

Exhibit 20 is different in that it shows shipments on which the Alton received the proportional into Peoria and out of Peoria. There is no way for me to determine that the shipments in and out were the same. I could not say whether anybody could determine that (Tr. 234). I get the

connection between the inbound shipment and the outbound [fol. 86] shipment because on the outbound shipment the shipper surrendered billing covering a shipment which the Alton hauled to Peoria.

Exhibit 22 is the only one which relates to divisions. I do not know whether that shipment moved through Peoria. The waybill showed that the shipment originated at Kansas City. I suppose the Alton got something for hauling the shipment; it was supposed to (Tr. 235). I do not know whether it made money out of it, as I did not examine the interline settlement. The exhibit was offered to show what the Alton is doing now on traffic out of Kansas City (Tr. 236). That shipment moved over the Alton from Kansas City to Dwight, through Peoria. I do not know what revenue the Alton received (Tr. 237).

B. T. Bailey was thereupon called as a witness for defendants, and being duly sworn, testified as follows: I am Commerce Clerk of the Grand Trunk Railway System at Chicago (Tr. 242). I am familiar with the complaint in this case and am a member of a committee appointed to present the defense.

I have prepared a map showing certain information with respect to the routes involved.

(Said document was received in evidence as Defendants' Exhibit No. 23 and is certified to this court) (Tr. 243).

The map is to show the direct routes from western territory, the northwest, trans-Mississippi and Northern Illinois, to Chicago, Peoria and St. Louis and the direct routes from those gateways to Buffalo and Pitsburgh, and to show that the route of the Alton through Chicago is not the direct route from Peoria in relation to origin territory mentioned in the complaint. The line of the C. St. P. M. & O. Railway is colored green on the map. The application of that route would be through Chicago. There is no route of the Northwestern Railway to the northwest to move traffic through Peoria without going through Chicago or points immediately west thereof (Tr. 244). The Omaha Line and the Northwestern connect at Wyeville, Wisconsin, and are practically one railroad. The Chicago, Burlington &

[fol. 87] Quincy has routes from the northwest via Chicago and Peoria. It is shown in orange on the map. The Burlington has a line down the Mississippi River to East Moline, Illinois (Tr. 245). It has a branch running from East Moline to Galesburg and Peoria, which is the only way it could take grain into Peoria. It has a direct route into Chicago. I think the rate to Peoria from the northwest permits routing through Chicago by the Burlington. My impression is that the rate from the northwest via Peoria is restricted to Chicago. There is no line of the Chicago, Milwaukee & St. Paul to Peoria (Tr. 246). The purpose of the map with respect to the Burlington Railroad is to show that grain from the northwest for points in Eastern Seaboard territory moving via Peoria would go to Peoria over a branch line. An actual route for such shipments east would be over the lines from Peoria such as the Toledo, Peoria & Western, the Pennsylvania, the Big Four and the Nickel Plate. The map also shows that Chicago would be the logical gateway for the traffic from northwestern territory because most of the lines which reach Chicago and Peoria get into Peoria on a branch line (Tr. 247). The map shows that the Northwestern, Rock Island, Minneapolis & St. Louis and Toledo, Peoria & Western have lines between Peoria and Chicago.

I have made no investigation of the relative volume of grain moving into Peoria via the Alton as compared to the movement via other lines. One of the witnesses for the Alton testified yesterday that the route of the Alton from Peoria to Chicago was difficult for operation (Tr. 248). I refer to Mr. Henderson's testimony with respect to operating conditions over the Alton from Peoria through Dwight to Chicago. I do not consider the Alton a natural route to the east from Peoria via Chicago (Tr. 249).

[fol. 88] Cross-examination:

My Exhibit 23 is calculated to show that with respect to some origin territory Peoria is more or less out of line on a movement to the east. I also contend that it shows that the Alton route from Peoria to the east is circuitous. I have made no comparison of mileages to show that. I arrive at the conclusion from the picture on the map (Tr. 250). I examined Mr. Behrle's exhibit showing mileages

over the various routes, but I could not say they were wrong as I have not checked them. The Alton route might be direct to Buffalo and Suspension Bridge, the points that were used, but it might not be to Pittsburgh and some of the south Atlantic ports. I have made no computation to show that it is not a direct line to other points. My entire exhibit is based upon the picture on the map (Tr. 251). If the traffic from Peoria to the east moved over a direct route it should take the direct lines east from Peoria. If it moved that way I do not presume the Grand Trunk Railroad would get any of the traffic as our line only comes to Chicago. If the traffic was handled direct, we would get none of it (Tr. 252). The Grand Trunk has never taken any action that I know of to eliminate its line as an eastbound carrier of the Peoria traffic from Chicago to the east. I do not know why it has not done that, as I have nothing to say about it. I would not say that it was the fault of the management in maintaining the Grand Trunk as a route so indirect as to make it impossible for it to be used. The Grand Trunk may be continued as a route and the Alton eliminated because possibly the Grand Trunk does not have as many operating difficulties as the Alton (Tr. 253). We also could receive the grain at Chicago via other lines, although if we received it from the Alton at Chicago it might be out of line. I do not know the mileages of the Chicago-Peoria lines (Tr. 254). I do not know that any other Chicago-Peoria line is shorter than the Alton, but I say that the Alton would be out of line in [fol. 89] hauling traffic from Peoria to Chicago because I think it would be. I do not think any line operating from Peoria via Chicago is a direct line to the east, and it is my personal opinion that all of the carriers operating east of Chicago and handling the traffic should be eliminated from the route. I do not know why the Grand Trunk has not eliminated itself. The Commission has held that 70 per cent is a reasonable percentage of circuity (Tr. 255). If the Alton comes within that 70 per cent, I would not say it is too circuitous, but I do not know whether it does or not. I would say that the Pere Marquette route from Chicago to the east was circuitous, but I do not know that it has made any effort to eliminate itself. I am testifying for all of the defendants, but I am not prepared to say as a traffic proposition as to whether or not the Pere Marquette

should be eliminated as a route (Tr. 256). I say that on traffic from the northwestern territory, it is an out of line haul to take the grain through Peoria. Testifying for the defendants, I advocate the elimination of Peoria as a transit point on grain from Northwestern territory (Tr. 257). I know of no action that has been taken by the eastern lines to bring about that result. To bring it about, there would have to be the regular legislation and cancellation of tariffs, which would possibly involve procedure before the Commission. I know of no action of that sort that has been taken.

EDWARD F. LEUCHTMANN was thereupon called as a witness for Defendants and, being duly sworn, testified as follows:

I am Chief of the Tariff Bureau of the Michigan Central Railroad (Tr. 258). I have held that position a little over two years and am familiar with the complaint in this case. I appear as a witness for all of the defendants.

I am familiar with the document introduced by complainants as Exhibit 2 and have used it quite often. I do not recognize it as a division sheet. It is merely a basis for [fol. 90] the construction of percentage issues (Tr. 259). If it was adopted as a percentage issue, the routing east and west of Chicago, Peoria, etc. would be wide open. Percentage sheets are issued on the basis of the circular to confine the movement of traffic to authorized routes. The percentages published on the basis of Exhibit 2 are not used in the division of rates on grain to my knowledge. The carriers east of Chicago have demanded their reshipping rates on grain and grain products for years. The Auditor of the New York Central advises that on grain and grain products from Trans-Mississippi River to Northwestern territories, transited at Peoria and rebilled via Chicago to Trunk Line and New England territory, he is allowing the lines east of Chicago junctions the Chicago reshipping rates in accordance with division sheet 226-A (Tr. 260). The Auditor of the New York Central is allowing these percentages to the New York Central. In the divisions on grain transited at Chicago and moving to eastern destinations, the reshipping

rates from Chicago to destination are applied (Tr. 261). The carriers east of Chicago, on grain from Trans-Mississippi or Northwestern territory, which does not move via Peoria, receive the reshipping rates from Chicago to destination. The carriers demand the reshipipng rates east of Chicago on grain transited at Peoria and reshipped east via Chicago because the lines east are not interested in the fact that the grain moves into Peoria for transit. If it moved to Chicago for transit, the reshipping rates would apply from Chicago east. The transit at Peoria was established to equalize transit at Chicago because the combination of rates at Chicago and Peoria was the same. If the lines operating to and from Chicago desire to meet the competitive rate via Chicago they should do the equalizing. If the Alton was allowed a proportion of the reshipping rate in excess of the established divisional, the carriers west of Chicago would receive greater revenue on a shipment destined to Eastern Trunk Line territory than they receive on a shipment for local delivery in Chicago (Tr. 262). It would also result in the eastern carriers receiving less for the trans- [fol. 91] portation from Chicago to the east when moving via Peoria than when moving via Chicago.

I have prepared a number of exhibits to introduce in this case. The first one is a statement showing actual shipments from representative points in origin territories to representative points in Trunk Line and New England territories. It shows the commodities, route and combination of rates on Chicago and Peoria on shipments moving from Peoria via the Alton. It does not show the through rate from original point of shipment to destinations in all cases. Where there were no through rates to Chicago or Peoria, we have only shown the rate from the breaking points, such as the Missouri River crossings (Tr. 263). Column 1 shows the rate to Peoria, Column 2 the rate to Chicago, Column 3 the reshipping rate from Peoria to destination, Column 4 the reshipping rate from Chicago to destination, and Columns 5 and 6 the combination of rates based on Peoria and Chicago. In every case the combination on Peoria and Chicago is the same. On a shipment of bran from Anoka, Minnesota, to Pulaski, New York, there are no through rates. In Column 1, I have shown the proportional rate from Minneapolis to Peoria of 11.5 cents; under Column 2 the proportional rate from

Minneapolis to Chicago of 11.5 cents. The reshipping rate east of Peoria and Chicago is 29.5 cents per hundred pounds, making a through rate from Minneapolis to Pulaski of 41 cents. The reshipping rate from Peoria to Pulaski does not apply via Chicago, as Tariff I. C. C. 2046 restricts the application of the proportional rate from Peoria on traffic originating in the Northwest (Tr. 264) to junctions via Chenoa, Illinois, and south. This eliminates the application of the reshipping rate from Peoria via Chicago, leaving the Chicago combination to apply. Wherever circle reference eight appears this condition obtains. On shipments of bran from Minneapolis via any of the direct Minneapolis-Chicago lines, the Chicago combi- [fol. 92] nation applies and the lines east of Chicago receive the reshipping rate as their proportion. Speaking of the second shipment from Anoka to Pulaski, a shipment was transited at Peoria and moved over the Alton to Chicago. The lines west of Chicago were allowed more than 11.5 cents. From Minneapolis they would receive more than their rate from Minneapolis to Chicago. On the third shipment from the bottom, from Wichita, Kansas (Tr. 265), originating on the Santa Fe and moving via Kansas City and the Alton to Peoria, thence to Ackerson Station, New York, the shipment was transited at Peoria and reshipped via the Alton to Chicago, Michigan Central and Delaware, Lackawanna & Western as livestock food. There are no through rates from Wichita, and the proportional rate from Kansas City was applied. From Kansas City to Peoria the rate is 14 cents and to Chicago is 16 cents. The reshipping rate from Peoria is 34.5 cents and from Chicago 32.5 cents, making the rate from Kansas City, Missouri, to Ackerson Station, New York, 48.5 cents. The 16 cent rate to Chicago from Kansas City is applicable via Peoria and the Alton but I do not know that it would be applicable on a shipment consigned to Chicago over the Alton and transited at Peoria (Tr. 266). When I say that the 16 cent rate would apply to Chicago, I mean that it would if the shipment moved in uninterrupted movement over the Alton from Kansas City to Chicago. I mean that the local rate of 16 cents to Chicago applies in direct uninterrupted movement. If the reshipping rate from Peoria were divided on established per cents via this route, the Alton would get 20 per cent or 7 cents, which

added to the 14 cent rate to Peoria would make 21 cents from Kansas City to Chicago as against the proportional rate of 16 cents applicable to Chicago (Tr. 267). The Alton would get 5 cents more revenue on the shipment than it would if the shipment had taken delivery at Chicago, thereby reducing the proportion of the lines east in the same amount. The statement shows a shipment of barley from Goodland, Kansas, to Homer, New York, origi- [fol. 93] nating on the Rock Island, transited at Peoria and forwarded by the Alton, Michigan Central and Delaware, Lackawanna & Western as livestock food. There is a through rate from Goodland, Kansas, to Peoria of 32.5 cents and to Chicago of 34.5 cents (Tr. 268). The rate to Peoria is a Rock Island rate (Tr. 269). The Alton is not a party to it. The shipment was reshipped from Peoria via Chicago, over the Alton, Michigan Central and Delaware, Lackawanna & Western as livestock feed (Tr. 270). The reshipping rate from Peoria is 30.5 cents and from Chicago 28.5 cents, making a through rate of 65 cents either through Peoria or Chicago. If this shipment had moved from Peoria over the Rock Island, the lines east of Chicago would have received their reshipping rate of 28.5 cents. If the lines west of Chicago were allowed a percentage of the reshipping rate from Peoria, they would receive more than the 34.5 cent rate from Goodland, Kansas to Chicago.

(Said document was received in evidence as Defendants' Exhibit No. 24 and is certified to this court.)

My next exhibit shows actual shipments from representative points in origin territories to representative destinations in the east, the commodity, route (Tr. 271) and rates via Chicago and Peoria. The shipments moved over the Rock Island. The statement contains practically the same information as Exhibit 24.

Mr. Towner: The Rock Island is not a party to this case. We are not trying a rate case here, and I cannot see the point of rate comparisons (Tr. 272).

Examiner Smith: Is not the whole trouble here that Chicago and Peoria are both grain transit points and the rates are adjusted so as to be the same, or nearly the same, through both points?

Mr. Aber: That is correct.

Examiner Smith: I am afraid that I will have to let that go in (Tr. 273).

The Witness: This statement contains practically the same information as Exhibit 24, except that the shipments [fol. 94] moved via the Rock Island. The purpose of the exhibit is to show that on shipments moving to Peoria for transit and reshipped via the Rock Island, the combination makes on Chicago and the lines east of Chicago receive their reshipping rates (Tr. 274). The statement shows under Column 4 the reshipping rates from Chicago, and I have testified that that is what the eastern lines receive. Whether it appears on the exhibit or not, on the traffic covered by Exhibit 25, the lines east of Chicago receive the reshipping rates from Chicago as their division, as shown in Column 4 (Tr. 275). The exhibit shows them as proportional or reshipping rates. If the reshipping rate from Peoria was prorated the Rock Island would receive in excess of its rate to Chicago, and if any of the shipments transited at Peoria would have moved to Chicago for delivery, the western lines would not have received in excess of the rates shown in Column 2, which are the rates to Chicago. On Exhibit 24, the proportional rates in the columns headed 3 and 4 are commonly known as the reshipping rates from Peoria to Chicago (Tr. 276).

(Said document was received in evidence as Defendants' Exhibit No. 23 and is certified to this court.)

My next exhibit is a statement of the rates from origin territories to Chicago, showing the extent to which they are applicable via the Alton. The origins are those named in Exhibit 24 and the statement shows whether or not the Alton is participating carrier. The effect of part of the exhibit is to show the limitation of the application of the rates from the Northwest (Tr. 277). It shows that some of the rates in Northwestern territory do not apply to Chicago via the Alton. On traffic from the Northwest the Alton is shown as a participating carrier and the rates to Chicago are applicable via Peoria and the Alton. From Trans-Mississippi territory the western lines have restricted, in most cases, the routing or have not shown the Alton as a participating carrier in their tariffs, presumably because they reach Chicago direct.

(Said document was received in evidence as Defendants' Exhibit No. 26 and is certified to this court) (Tr. 278).

[fol. 95] Cross-examination:

In 1913 I was employed by the Michigan Central as Chief Percentage Clerk. I heard Mr. Behrle call Exhibit 2 a percentage sheet (Tr. 279). He was right in saying that it was a combination of percentages that had been in effect for a good many years. I do not recall how many years prior to 1913 it had been in effect. I started railroading in 1907 and I guess the basis was set at that time. This circular, or an older issue of it, was then in effect. I was an office boy in 1907 but I know what was the intention of the people who put the percentages in by studying the work of the department, old files and getting myself acquainted with the words (Tr. 280). Exhibit 2 is not a statement of percentages that ever became effective. The words on page 3 of Exhibit 3, reading "percentage allowances to apply on eastbound freight," etc. mean that if a percentage arrangement was made that divided on any of the junctions specified in the exhibit they would be based on the figures therein. The language on page 3 of Exhibit 2 read "Allowances to western roads on freight from points taking the following agreed basis of the Chicago and New York rates," means that as to points that are in the so-called percentage groups the carriers will receive the percentages indicated for the specific percentage group (Tr. 281). The document is not one allowing those percentages to those roads. It is a basis for the establishing of percentage arrangements but does not establish those arrangements itself. I would not say that it has never been applied in the division of rates applicable on grain, grain products and by-products moving from Peoria to the destinations involved in this case, but I will say that it is not a recognized percentage sheet. I did not study Mr. Behrle's exhibit showing the settlements that have been made by the eastern lines on some of the shipments from Peoria and did not know that on some of the traffic the Alton was given 20 per cent (Tr. 282). I do not [fol. 96] know why it was given 20 per cent. There are established percentages in effect but I know of no percentage sheet which applies on grain. The 20 per cent is to apply on other traffic (Tr. 283). On the third sheet of Exhibit 15 there was non-transit tonnage of 4,350 pounds moving on a

rate of 31.5 cents, of which the Alton got 20 per cent. That is non-transit grain and the established percentages are authority for the 20 per cent. Those established percentages are 20 per cent to the Alton and 80 per cent east. The division sheets containing these percentages are numerous but I cannot name them all because I do not know what they are. I do not know what arrangements the Nickel Plate or other roads have with the Alton. I know that we have percentage arrangements with the Alton (Tr. 284) which allow the Alton 20 per cent from Peoria. I think that Exhibit 3 listed it. It is shown on the next to the last page of Exhibit 3. I think it is New York Central percentage issue 328-B (Tr. 285). To my knowledge the eastern lines have always demanded the reshipping rates east of Chicago upon traffic from Peoria. Page 1 of Exhibit 17 is nothing more or less than the proceedings of a special committee which only has power to recommend (Tr. 286). If the Alton received connecting line percentages on this traffic, the eastern lines would get less than their Chicago reshipping rates, but I cannot speak for the accounting department. I cannot do more than take our auditor's word for it (Tr. 287). So far as I know, the committee named on the face of page 1 of Exhibit 17 does not promulgate divisions (Tr. 288). The same committee did not issue the division sheets in evidence as Exhibits 4 and 5 (Tr. 289). Those division sheets were approved and authorized by the General Committee of the Central Freight Association. I distinguish that committee from the Chicago District Committee. The eastern lines have always insisted upon their Chicago reshipping rates as a minimum on traffic reshipped from Chicago, Peoria and East St. Louis (Tr. 290). I wish to correct that as I did not testify as to St. Louis (Tr. 291). I do not know whether or not the Michigan Central, on traffic from East St. Louis [fol. 97] to Chicago over the Wabash and thence east over the Michigan Central, divides with the Wabash on a basis which leaves to the Michigan Central less than the Chicago reshipping rate (Tr. 292).

Eugene Morris is Chairman of the Central Freight Association. He frequently represents our roads in handling these matters with other committees. He does not represent the eastern lines. He acts as chairman of the Committee and the eastern lines represent themselves (Tr. 293). I do not know if Mr. Morris had authority to write the

letter of July 10, 1928, in Exhibit 17, to Mr. Galligan, relating to the divisions involved in this case. B. T. Jones had our power-of-attorney in publishing Exhibit No. 5. He was authorized to issue Exhibit 5 by the Central Freight Association carriers (Tr. 294).

The first shipment I refer to on Exhibit 24 was the one in the second line which moved from Anoka to Peoria over the Minneapolis & St. Louis. The Minneapolis & St. Louis rate to Peoria is 11.5 cents and appears in Column 1. The figure "3" before it shows there was no through rate so that the rate to Peoria was a proportional rate from Minneapolis. I said that the 11.5 cent rate was the rate from Anoka to Peoria (Tr. 295) but that where there were no through established rates we used the combination. I used one factor of the combination. In the shipment just above that one, the route from Acres, Kansas, to Peoria was over the Santa Fe and Toledo, Peoria & Western on a rate of 32.5 cents. That was a joint through rate. In the column headed "2" is a rate of 34.5 cents, designated as the rate to Chicago. The Santa Fe publishes that rate to Chicago (Tr. 296). The Alton does not join in the rate of 34.5 cents from Acres to Chicago. The shipment moved out of Peoria over the Alton, probably to Dwight, as a shipment of animal feed. The proportional rate from Peoria to the destination, as shown in column 3, is 31.5 cents. I am not prepared [fol. 98] to say what the Alton (Tr. 297) should receive as its division from Peoria to Chicago. The lines east have no objection to the Alton being added as a party to the rates from the River, and it is up to the Alton if it wishes to arrange for percentages with their western connections.

On the first shipment on the exhibit the Alton is not a party to the rates to Peoria. It only gets into the transaction by hauling a carload of animal feed from Peoria. That is its only participation in the movement (Tr. 298). I do not necessarily agree that the Alton's compensation for its service must come out of the 31.5 cent rate. If it was added as a party to the rate to Chicago, it would get part of that rate. The fact is that the only rate to which the Alton is a party is the 31.5 cent rate, and it follows that the Alton's compensation must come out of that rate as the thing now stands. I do not agree, however, that the Alton should have proper compensation for its service out of that rate (Tr. 299). Still speaking of the same shipment, the inbound com-

modity on the exhibit was bran and the outbound commodity was animal feed. The outbound shipment may not have been made out of the same bran moving inbound, but the matched billing was presented to get the lower rate. The transit billing shows that animal feed was the only thing in the car when it moved out of Peoria (Tr. 301). The transit billing shows that. If there was any non-transit commodity in the car, it would not appear on that billing. There might have been coal in it so far as I know. It is possible that some non-transit commodity was in it.

The third shipment from the bottom on this exhibit, from Wichita, Kansas, to Peoria, shows a rate of 14 cents (Tr. 302) which is the proportional rate from Kansas City to Peoria. The 16 cent rate in Column 2 is the proportional rate from Kansas City to Chicago. Both rates are through rates over the Alton from Kansas City to Chicago. I do not know if the 16 cent rate applies over the Alton from Kansas [fol. 99] City to Chicago with transit at Peoria (Tr. 303). I do not know about the application of that 16 cent rate. The exhibit shows a shipment of bran inbound and livestock feed outbound. I only have the transit billing on the outbound shipment and it would not show if there was anything else in the car. It shows that the entire shipment was livestock feed, but I do not think that billing would show any non-transit commodities (Tr. 305). Speaking of that same shipment, I do not think the Alton should get in excess of the rate of 16 cents from Kansas City to Chicago for its total service. That would limit it to 2 cents on the haul from Peoria (Tr. 306). The fourth shipment from the bottom of Exhibit 24 came into Peoria over the North Western Railway. It is not likely that it would go out of Peoria over the North Western through Chicago as that route is very circuitous. It would have to come out of Peoria over a direct line (Tr. 307). The Alton could get in on that transportation. The reshipping rate from Peoria would not apply on that shipment via Chicago. The rate is restricted on traffic from the North Western to apply via junctions, Chenoa, Illinois and south. The rate must be a grain products rate (Tr. 308). The shipment was one of barley into Peoria. I said that there was no reshipping rate from Peoria on animal feed via Chicago, as the reshipping rates from Peoria only apply via Chenoa and south (Tr. 309). I do not see how that shipment could move under the grain

products rate via Peoria. The Chicago combination was applied. On Exhibit 25 the rate of 16 cents shown on the first shipment in Column 2 of the exhibit is a proportional rate from Kansas City, Missouri (Tr. 310). That is an Alton rate all the way from Kansas City to Chicago. The Rock Island does not get in on it at all. The 14 cent rate is exactly the same sort of a rate to Peoria. The 16 cent rate is the same one that I testified about before. I do not know whether it applies via Peoria with transit at Peoria. On the second shipment on Exhibit 25 the 31 cent rate to Peoria [fol. 100] is a Santa Fe rate. The 33 cent rate to Chicago is also a Santa Fe rate (Tr. 311). I do not know whether or not the Rock Island is a party to the 33 cent Santa Fe rate to Chicago via Peoria. The rate is contained in the Santa Fe tariff. On Exhibit 25 all the rates in Column 2 without reference marks against them are the rates from the origin points to Chicago (Tr. 312). Some of them apply via Peoria and some of them probably do not (Tr. 313). In the case of the second shipment on Exhibit 25, the 33 cent rate is the rate from Attica, Kansas, to Chicago over the Santa Fe (Tr. 314). The Rock Island does not get in on that and yet the exhibit shows an outbound route from Peoria over the Rock Island (Tr. 315). What I have in mind is that the railroad bringing the shipment to Peoria should also bring it to Chicago and that any other railroad should either be limited to the difference between the rates to Peoria and Chicago or stay out of the traffic. That is the purpose of this exhibit. If the rate to Chicago does not apply via Peoria in connection with the Rock Island, nothing is left to apply but the Peoria combination (Tr. 316). The basis for my conclusion is that the Rock Island in hauling the shipment from Peoria to Chicago should be limited to 2 cents. The difference between the two Santa Fe rates is that we receive our reshipping rates east of Chicago. It is not a fact that we can only continue to receive those rates by only giving the Rock Island 2 cents (Tr. 317). On the facts as they are now, it is only by limiting the Rock Island to 2 cents on the movement from Peoria that we can continue to receive our Chicago reshipping rate. I am not saying that the Rock Island should be limited to that (Tr. 318). That is the purpose of these comparisons. In the first shipment on Exhibit 26, the cross indicates that the rate to Chicago is not applicable via the Santa Fe. The rate shown

is 34.5 cents (Tr. 319). That is the rate from Acres, Kansas, and applies to Chicago but does not apply via the Alton [fol. 101] (Tr. 320). I have endeavored to indicate where the Alton is a party to the Chicago rate and where it is not a party to the Chicago rate. In the case of the Acres shipment, for example, the 34.5 cent rate to Chicago does not apply over the Alton. Nothing is left via Peoria but the Peoria combination. The traffic would move out of Peoria on the reshipping rate (Tr. 321). The rates are applicable via Peoria to Chicago only when the Minneapolis & St. Louis or Alton handle the traffic. In the case of the fourth shipment from the bottom on Exhibit 26, it appears that the rate to Chicago is not applicable via the Alton (Tr. 322). That is the rate from Minneapolis. If this statement is correct, then on Exhibit 24 the same shipment from Peoria which was handled by the Alton would move under the local rate. The transit billing shows a rate of 26 cents out of Peoria. I do not know what that rate was and do not think it is a proper one (Tr. 323). The 28.5 cent rate shown in Column 3 on Exhibit 24 is the reshipping rate, but it is not applicable via Chicago. The shipments on this exhibit do not show the rates shown on the transit billing. The rates shown are those taken from the tariff that should have applied (Tr. 324). On this particular shipment the rate to Chicago is not applicable via the Alton. The rate that applies to Peoria is not applicable via Chicago. Therefore, the rate assessed by the Alton on the outbound shipment is wrong as the local rate should have been assessed. The proportional rate under Column 3 does not apply via Chicago (Tr. 325). Under the tariff, the local rate would have applied but I do not know what it is. The divisions accorded the Rock Island on shipments moving outbound from Peoria on Exhibit 25 are not involved in this case (Tr. 326).

[fol. 102] Redirect examination:

I said that for some years the eastern lines had been insisting upon receiving their Chicago reshipping rates on this traffic (Tr. 327). The letter written by Chairman Morris, which appears as page 8 of complainants' Exhibit 17, is dated March 16, 1928. It was to confirm the understanding, as we have always demanded our reshipping rates east of Chicago. The Chicago District Committee, referred to

on page 1 of Exhibit 17, handles these matters in the Chicago district. It is a sub-committee which reports to the general committee and all that it can do is recommend (Tr. 328). The recommendation of that committee shown on page 1 of Exhibit 17 was not concurred in by the general committee. The action of the general committee was as shown in Mr. Morris' letter on page 8 of Exhibit 17. On our railroad the traffic department instructs the accounting department as to the basis of divisions to be applied on this traffic (Tr. 329). The traffic department is the agency of the various railroad companies which demands the reshipping rates from Chicago.

Recross-examination:

The agreement that I spoke of with respect to the allowance of reshipping rates east of Chicago was an action of the eastern lines. The Michigan Central Railroad does not have a line to Peoria (Tr. 331). The only way it can participate in this traffic is by getting it from a connecting line. I concede the right of the Alton to participate in the traffic for the purpose of hauling it to a connection with us.

[fol. 103] C. C. PLUMMER was thereupon called as a witness for defendants and, being duly sworn, testified as follows:

I am Special Agent in the Freight Traffic Department of the Pennsylvania Railroad (Tr. 332). I have had 13 years of experience in the rate department and am familiar with the complaint in this case. I am testifying in behalf of all the defendant carriers in Central Freight Association territory.

I wish to introduce as an exhibit a copy of Joint Rate Committee Circular No. 129 of January 30, 1905.

(Said document was received in evidence as Defendants' Exhibit No. 27 and is certified to this court) (Tr. 333).

The Joint Rate Committee had in its membership representatives of both eastern and western lines. By this circular the basis of equalization of rates on grain from western points to eastern points was established. Paragraph 6 on the back of the circular reads:

"That in the division of the through rates, neither eastern nor western roads shall receive more than their local or authorized commodity rate."

The Alton was and is a western road. The paragraph shows that the divisions which the eastern roads are now contending for is the same as was established in 1905 (Tr. 334). If the Alton prevailed in this case, the western roads would receive more than their local commodity rates in every instance. The basis established in 1905 is still the basis that the eastern roads are contending for. After Federal control there was some confusion as to the division sheets on the part of the accounting departments and Exhibits 4 and 5 were issued to clear up the matter for the acounting departments. Exhibit 2 shows percentage allowances to apply on eastbound freight originating at Mississippi River points and points east. It shows percentage proportions from various groups of origin. Rule 5 provides that the percentage divisions are to be used only in the division of through rates made on the agreed percentage rate basis of the Chicago-New York rates. The [fol. 104] proportional rates on grain from Peoria and East St. Louis are not on the agreed percentage basis. Peoria is a 110 per cent point (Tr. 335). The reshipping rate from Peoria is not on the 110 per cent basis but is 2 cents higher than Chicago. St. Louis is now a 117 per cent point and the St. Louis rate is 4 cents over the Chicago rate. That is not 117 per cent of the Chicago reshipping rate, although I have not worked it out. The Chicago-New York rate on grain now is 34.5 cents (Tr. 336); that is from St. Louis. The Chicago grain rate is 30 cents. The grain products rate from Chicago is 30.5 cents and from St. Louis 35.5 cents or 5 cents more. The reshipping rate from Peoria is less than 107 per cent of the Chicago reshipping rate, so it is obviously not based upon that (Tr. 337). The Peoria rate was originally 1.5 cents higher than Chicago and the East St. Louis rate was 3 cents higher than Chicago. After the 40 per cent increase, the St. Louis rate was 5 cents higher than Chicago and the Peoria rate 2.5 cents higher. Following the 10 per cent reduction it became 2 and 4 cents. It is an equalizing proposition and is different from the percentage group basis. That basis of rates is

only in effect on grain and is different from anything else. Rule 5, at the bottom of page 4 of Exhibit 2, clearly excludes the circular from use in dividing rates on grain traffic. There being no percentages, the rates divide as made on Chicago. If the shipments involved in this case are new shipments from Peoria, the local rates are applicable (Tr. 338) and undercharges exist. On page 174 of Exhibit 1 are shown the rates on grain products from Peoria applicable on the traffic involved. The tariff reads:

"Applies on shipments originating in Trans-Mississippi River Territory, Northern Iowa Territory, Illinois-Iowa Territory, and Northwest."

They are not applicable on shipments originating at Peoria. It is necessary to go back to the point of origin to deter- [fol. 105] mine the application of the rates from Peoria (Tr. 340). The shipments originated at points in western territory and stopped in transit at Peoria, and later moved on from Peoria to complete the transportation. There is another reason why it is necessary to refer to the origin territory for the date of the origin of the shipments. The rates involved in this case applied to shipments from Peoria are only applicable by reason of the rules in Exhibit 9, the transit tariff. Rule 60 of that exhibit provides that the through rate to be applied from origin to final destination will be the rate in effect via the transit point at the time of the initial shipment of the commodity covered by the inbound billing matched against the outbound shipment; except that where the outbound shipment consists of grain or grain screenings, the through rate to be applied on the outbound shipment (Tr. 341) will be that applicable to grain products in effect at the time the grain or grain screenings originated. Probably 90 per cent of the shipments from Peoria involved in this case consisted of animal, poultry or livestock feed. The rate applied from Peoria was not necessarily the rate on livestock feed. It was the rate on the inbound commodity to Peoria, except that when the inbound commodity was grain or grain screenings, the rate applied on the livestock feed from Peoria was the rate on grain products. The transit tariff also provides that the rate shall be the rate from initial point of shipment to final destination in effect at the time

of the shipment from the initial point. If the rate from Peoria was reduced 5 months ago, and this month a shipment was made from Peoria against which was matched an inbound shipment originating 6 months ago, the rate to be applied on the shipment would not be the rate now in effect but would be the higher rate in effect 6 months ago. I mean by that, the outbound rate from Peoria (Tr. 342). A situation of that kind would never obtain in connection with [fol. 106] a local shipment from Peoria. I am familiar with the functions of the Chicago District Committee and the General Committee of the Central Freight Association, and heard Mr. Leuchtmann's testimony with respect to pages 1 and 8 of Exhibit No. 17. I subscribe to that testimony. The eastern lines did not first take the position that they should have their reshipping rates on this traffic on March 26, 1918. To my knowledge that has been the position of the eastern lines since the establishment of the equalization basis of rates in 1905 (Tr. 343). When the rates were established, the arrangement for divisions was agreed to by the eastern lines. This is nothing new.

Cross-examination:

Exhibit 27 only applies with respect to through rates on grain originating in Trans-Mississippi River territory. That does not mean joint through rates (Tr. 344). The circular provides for the establishment of through rates on the combination basis, but it only applies to Trans-Mississippi River territory. I do not know what the local rates of the Alton are on grain, grain products and by-products of grain from Peoria to Chicago, Joliet and Dwight. I say that the Alton would get more than those local rates if we took less than the reshipping rate from Chicago because the authorized rate on grain traffic moving from the west to the east, via Chicago, would be the rate to Chicago, which is 2 cents higher than the rate to Peoria (Tr. 345). I did not intend to say that the Alton would get more than its local rate from Peoria. I meant that the western lines would get more than their rates to Chicago. In the case of a shipment to Peoria over the Santa Fe, transited there and moving outbound over the Alton, there is no way the Alton can participate in the earnings of the Santa Fe on the move to Peoria. The earnings the Alton would get for handling the traffic from Peoria to Chicago

on the reshipping rate are not the only earnings that it [fol. 107] would get (Tr. 346). They would get the difference between the reshipping rate from Peoria and the reshipping rate from Chicago. On a car handled by the Santa Fe to Peoria, the Alton would get none of that rate so far as I know. If the Alton hauled the shipment outbound from Peoria, it is not necessary that it get its revenue out of the reshipping rate (Tr. 347). It gets what is left after we take the reshipping rate from Chicago. The difference between that rate and the reshipping rate from Peoria is what is left to the Alton. The Alton cannot look to any earnings west of Peoria on that sort of traffic in payment of its services any more than it can look to the roads east of Chicago for more than it gets. The reshipping rate is a joint rate published, for example, by the Alton and Pennsylvania, but that rate does not have to be divided between the Alton and the Pennsylvania (Tr. 348). We do not divide that rate, although it is a joint rate. We do not arbitrarily take our reshipping rate. That was agreed to by the eastern roads and the western roads in 1905, including the Alton. I recall that in the case of some of the shipments included in Mr. Behrle's exhibits, the Alton got nothing (Tr. 349). I think that if the Alton is not satisfied with those divisions, it ought to go out of the business, although we join in the through rates with the Alton. We are not trying to put the Alton out of business; that is up to it. If it wishes to haul it for nothing they can haul it that way. Our attitude is that we are going to take our reshipping rate from Peoria whether school keeps or not (Tr. 350). It does not make any difference to me whether the Alton gets anything for its haul. If it were not for the fact that the rates are equalized through Chicago and Peoria, the Alton would only be in a position to handle a small part of the traffic because then the Chicago combinations would apply. The origin roads do not wish to short haul themselves and do not make their rates to Chicago applicable [fol. 108] via the Alton. Thus, if the Chicago combination was the only one available, transit at Peoria would only apply in connection with the roads over which the rate to Chicago was applicable via Peoria. When the reshipping rates were first established from Peoria to the east, they were applicable only through Chenoa and junctions south thereof. The Alton did not then participate in the traffic.

Since then exceptions to the application of the rates have been adopted. The Alton gets into the traffic only by reason of the equalization of the rates through Peoria and Chicago (Tr. 351). It is not true that the trouble with these divisions is that the reshipping rates are not high enough to permit us to take what we think we are entitled to and still leave enough to give the Alton what it thinks it is entitled to. The Alton only participates in the traffic incidentally. The question is a big one, involving all eastern and western roads, and if the divisions are to be established on the Alton situation, the tail would be wagging the dog. The Rock Island would compound its earnings on 75 per cent of the shipments and the principle is the same on the Alton (Tr. 352). On Sheet 1 of Exhibit 15 the total revenue on the transit part of the shipment, amounting to $103.48, was taken by the Elgin, Joliet & Eastern and the Pennsylvania and the Alton got none of it. I think that is all right (Tr. 353).

Examiner Smith: I notice on Exhibits 24 and 26 that in the case of some shipments, the rates to Chicago and Peoria are the same; that on other shipments the difference in rates is 2 cents, but that the through rate to the eastern point is the same. I would like to have some light on that when the case is discussed (Tr. 354).

The Witness: The reason why Exhibit No. 2 does not prescribe a divisional basis on traffic from Peoria is because the rates are not 110 per cent of the Chicago rate (Tr. 355). Exhibit 2 does prescribe a 20 per cent division [fol. 109] to the western lines on miscellaneous traffic from points in the 100 per cent group. It is a basis for divisions and the percentage sheets conform to that basis showing the junction points in addition. The division sheets listed in Exhibit 3 do not set the basis on this particular traffic. The rates divide on Chicago and Joint Rate Committee Circular, Exhibit 29, which has been introduced as an exhibit sets the basis (Tr. 356). As to Northwest territory, the situation is the same to the extent that the Peoria combination equalizes the Chicago combination. I say that Exhibit 2 does not fix the divisions here involved. Exhibit 27 only applies to one territory. Prior to the issuance of Exhibits 4 and 5, the reshipping rate east of Chicago was the basis for the divisions. It has always been the basis

but I cannot give reference to the old records on the point. I also disclaim the statement made by the Chicago Committee in Exhibit 17 that the eastern lines insist upon applying the connecting line percentages. That was a recommendation of a sub-committee which was ignored by the General Committee. I think that livestock feed takes the grain products rates out of Peoria (Tr. 357). In 1905 the Alton agreed to give the eastern roads their reshipping rates from Chicago. That was done by their member of the Joint Rate Committee. I was 5 years old in 1905 (Tr. 358). I do not know of anybody with the Alton who made that agreement. I say it upon the authority of the exhibit which I introduced here. That is my basis for the conclusion. I know the Joint Rate Committee was a joint rate committee of the eastern and western lines. I based my statement that the Alton agreed that the eastern lines should get their Chicago reshipping rates on this traffic upon this circular (Tr. 359) and my general knowledge of rate and division matters. I have no record other than that exhibit which shows an agreement to that divisional basis by the Alton.

[fol. 110] Redirect examination:

The committee that issued Exhibit No. 2 is the same committee that issued Exhibit No. 27. It was a committee of eastern and western lines, and I have no doubt that Alton is a member (Tr. 360). I cannot say positively.

Recross-examination:

I did not say that either Exhibit 2 or Exhibit 27 were division sheets. Exhibit 27 sets a basis of divisions but there is a difference between a document that sets a basis of divisions and a division sheet. Exhibit 2 is not a sheet which would be used by the accounting department in dividing rates.

(Whereupon defendants rested.) (Tr. 361.)

J. A. Behrle, having previously testified, was recalled and testified as follows:

I have secured the additional figures for which we were waiting and have them in the form of exhibits. They con-

tain a statement of the property assessment, rate of return, operating and traffic statistics and averages of the Alton and designated eastern carriers. The eastern carriers are those which have actually hauled shipments from Peoria to points east of the western termini of the Eastern Trunk Lines, as shown in previous exhibits. This information is taken from annual reports of the Alton (Tr. 362) and the eastern lines filed with the Interstate Commerce Commission. In some cases the averages such as the density figures, for example, are not shown but the basis data from which the information may be secured is shown in the exhibits. The density of traffic would be checked by dividing a mileage of the railroad operated into the total ton miles handled.

(Said documents were received in evidence as Complainant's Exhibits 28, 29 and 30 and are certified to this court.)

The rates from Peoria locally to Eastern Trunk Line territory are made on the basis of a proportional of 11.5 cents [fol. 111] to Chicago, plus the reshipping rate of the eastern lines east of Chicago (Tr. 363). These so-called local rates are joint through rates from Peoria to the eastern destinations but apply on traffic which from a rate standpoint is assumed to be local when shipped. To illustrate, Exhibit 15 shows a shipment from Peoria to Bombay, New York. On the second sheet pertaining to this shipment there is shown a non-transit part, to which the so-called local rate would apply, being a rate of 44 cents. This is the grain products rate from Peoria to Bombay. The rate is made 11.5 cents to Chicago and 32.5 cents east, or a total of 44 cents, and should so divide. In 28 I. C. C. 549, the Illinois carriers had requested an increase of one cent per hundred pounds in their proportion west of Chicago and this was granted. The decision dealt at length with the method of constructing grain rates from Illinois to eastern trunk line territory (Tr. 364). We find, however, that in dividing these so-called local rates from Peoria, the eastern lines are applying a 20 per cent division to it. 20 per cent of 44 cents, in the case to which I have referred, equals 8.8 cents, and the eastern lines receive the balance of 35.2 cents or 2.7 cents more than their reshipping rate. I said that we did not expect the Commission to disturb the adjustment under which we receive our specifics in the divi-

sions of the rates from Illinois points via Chicago to the east. I do not include in that statement shipments where we will receive less than that proportion. The Alton is now receiving less than its specific and to that extent is requesting the Commission to correct the sheets (Tr. 365). We regard the specific as a minimum. It was also said that Exhibit 2 was applicable only to rates taking 110 per cent of the Chicago rate points. The designation of 110 per cent is only to designate origin territory commonly taking the 110 per cent basis. It was discussed at 28 [fol. 112] I. C. C. 549. The original basis for the reshipping rates was the application of 110 or 117 per cent of the Chicago rate, but where that figure was changed for equalization purposes a departure from the percentage basis was necessary (Tr. 366). In connection with Exhibit 2, it is true that in dividing the rates from Peoria to eastern destinations applying on non-transit commodities, the eastern lines have been giving the Alton 20 per cent. Exhibit 2 is the only authority I know of on which they might do this. I might say that for convenience these percentages are sometimes transferred from the Joint Rate Committee division sheet to an individual publication, and to the extent that this has been done those publications are listed in Exhibit 3 with respect to connecting line traffic. It all relates back to Exhibit 2, however (Tr. 367), which, after all, establishes the basis of divisions. We have this division sheet, Joint Rate Committee percentage circular A, effective July 1, 1895, as well as the issues since then, in our file and use it regularly. I am able to say that the percentage established by Exhibit 2 has been in effect as far back as 1895. In connection with the application of the reshipping rates and their division, I have a copy of a letter written by the General Freight Agent of the Delaware, Lackawanna & Western to the Assistant General Freight Agent of the Nickel Plate on September 22, 1926. A copy was sent to us. It was written in connection with livestock shipments, upon which the eastern lines had restricted us to connecting line percentages. We questioned it (Tr. 368). The Delaware, Lackawanna & Western said to the Nickel Plate that, as advised, when reshipping rates were authorized from Peoria, it was understood that connecting line percentages should apply and requested settlement on that basis. The taking of those per cents by the eastern

lines in that case gave them less than their reshipping rate from Chicago. The local rate of the Alton on grain, grain [fol. 113] products and grain by-products from Peoria to Chicago is 11.5 cents. I have been in the traffic and divisions departments of the Alton for 26 years (Tr. 369). I know of no agreement ever made by any representative of the Alton that in the division of these reshipping rates from Peoria the eastern lines should receive their Chicago reshipping rate. We have no records in my department which indicate that such an agreement was made. For the last 7 or 8 years the practice of the eastern lines has been to divide these rates on local percentages, although in some cases connecting line percentages were applied. Nothing serious developed, however, until the report of the Chicago committee shown in Exhibit 17 (Tr. 370), showing that we were more frequently held down to connecting line percentages. We made inquiry and when we asked the Central Freight Association to reconsider, they then, for the first time, issued a division sheet taking the reshipping rates. The Alton maintains a reshipping rate from Kansas City to Chicago, which is 2 cents higher than its reshipping rate to Peoria. The difference of 2 cents is not the measure of the Alton's local rate from Peoria to Chicago (Tr. 371). The committee, the proceedings of which are shown in Exhibit 17, is, as I understand it, a committee of the Central Freight Association. They took their action without considering the Alton, and it was given effect. When we questioned the delivering lines they referred us to the action of the Chicago committee to justify what they did. We then applied to the Central Freight Association and were given a copy of the recommendation of the Chicago committee. When the Illinois Freight Association then took the matter up with the Central Freight Association, the eastern lines decided to take their reshipping rates (Tr. 372). There is a distinction between the handling accorded transited shipments moving on joint through rates through the transit point and the privileges accorded shipments that move on local rates into the transit points and reshipping rates out. In the first case there is an applica- [fol. 114] tion of the through rate of the entire movement, and on the other case the shipment moves on two factors, the rate in and the rate out. When transit is afforded on a joint through rate via Peoria or another transit point,

there is a readjustment of the inbound charges when the outbound shipment moves, but in the case of the traffic here involved there is no such readjustment (Tr. 373). In connection with the fourth from the last shipment on Exhibit 24, it was said that the Chicago combination would apply to this movement. The shipment moved to Chicago over the Chicago, Milwaukee & St. Paul over the North Western to Peoria and over the Alton to Joliet. The statement was then made that the combination of rates from Wheaton to Peoria and from Peoria to Joliet and from Joliet to Caneadea would apply. I have explained that there is no exception against the application of the Peoria reshipping grain products rate on North Western traffic to Eastern Trunk Line territory. The exception is against the grain and the by-products rate. This shipment took the grain products rate. Consequently, the rate out of Peoria was the reshipping rate on North Western grain products to destination. The exhibit is in error in showing that the reshipping rate does not apply on that commodity (Tr. 374). It is also in error in every case where it shows that the reshipping rate does not apply on grain products shipped from Peoria on the reshipping rate. In discussing the application of the rates in Columns 1 and 2 of Exhibit 24 (Tr. 375), I will take the first case on Exhibit 24 as an illustration. That is a movement from Acres, Kansas, via the Santa Fe and the Toledo, Peoria & Western to Peoria. From Peoria the route was via the Alton, the Nickel Plate, the New York Central, P. & L. E. and Western Maryland. The Alton could only participate in the haul to Chicago or Chicago junctions, and has no rate in connection with the Santa Fe or Toledo, Peoria & Western from Acres, Kansas, or from Kansas City to Chicago, Joliet or Dwight. [fol. 115] The 34.5 cent rate to Chicago in Column 2 is not an Alton rate and it has nothing to do with it. That is generally true of all the rates in Column 2. The Alton comes in under Column 3 (Tr. 376). We only get in on the reshipping rate which moves the product out of Peoria (Tr. 377).

Cross-examination:

It has only been in the last few years that the eastern lines have insisted on their Chicago reshipping rate on this traf-

fic from Peoria. I think it was in September, 1927 that we were apprised of concerted action to restrict us to these connecting line percentages, although before that we did have difficulty on isolated shipments. I heard Mr. Leuchtmann and Mr. Plummer say that so far as their lines were concerned, they have insisted on the Chicago reshipping rates since 1905, but I don't think they knew (Tr. 378). Mr. Leuchtmann's line participates in this traffic as an intermediate line and the settlement is usually made by the delivering line. Mr. Leuchtmann's auditor said he was settling on the reshipping rates but the settlement is in the hands of the delivering line and Mr. Leuchtmann's auditor would not settle. I understood he was speaking for the Michigan Central (Tr. 379). That auditor settles all billing for the New York Central lines. Mr. Morris notified us of the action of the Chicago committee on September 24, 1927, and at that time told us that the lines east would take their reshipping rates. The action of the Chicago District Committee as shown on page 1 of Exhibit 17 was final so far as the Alton was concerned (Tr. 380). It made settlement on the basis of that recommendation. I could not say that it appears that they were only recommending something. The effect of it was that the eastern lines made settlement on that basis and you can call it a recommendation or anything else you wish. I call the Delaware, Lackawanna & Western an eastern line (Tr. 381). The letter I refer to was written to the Assistant General Freight Agent of the [fol. 116] Nickel Plate, which connects at Chicago with the lines bringing this traffic from Peoria. I do not have a letter from the Nickel Plate man to which that letter was an answer. We have a rate from Kansas City to Chicago 2 cents higher than the rate from Kansas City to Peoria. Those rates apply on grain. The rate from Kansas City to Chicago does not apply via Peoria and we do not permit transit at Peoria under that rate (Tr. 382). I said that the 44 cent rate to Boston was made of 11.5 cents, our local rate from Peoria to Chicago, plus 32.5 cents from Chicago. That 32.5 cent rate is a proportional rate east of Chicago. I do not know that there is a local rate from Chicago (Tr. 383). I have never come in contact with it. The reshipping rate is the one that is used. The 44 cent rate is 135 per cent of 32.5 cents. Out of the 44 cent rate, the eastern lines give us 8.8 cents or 20 per cent (Tr. 384). The reason

for the statement that the 20 per cent would only apply where the point took the 110 per cent Chicago rate is that the traffic upon which the 11.5 cent specific, plus the reshipping rate, applies is so-called local traffic not entitled to the reshipping rate. The two rates are made in a different way. The basis for the application of the reshipping rates was that the Chicago-New York rate was the base. Peoria was figured on 110 per cent and St. Louis 117 per cent (Tr. 385). Then there came the question of equalizing the gateways and that caused readjustments which were applied to St. Louis and Peoria. The subject was discussed at length by the Commission in its decision in I. & S. Docket 232. A 110 per cent point does not necessarily always pay a rate 110 per cent of the rate from the 100 per cent point. This joint rate committee percentage sheet was to designate the territory ordinarily taking those percentages (Tr. 386). On the 44 cent shipment I referred to, the Eastern Trunk Lines [fol. 117] took 2.7 cents more than their reshipping rates (Tr. 387). There is a discussion of the percentage relation of the reshipping rates on pages 559 and 560 of the decision at 28 I. C. C. 549. The receivers of the Alton were appointed on August 30, 1922 and the road has been in receivership since that date and still is (Tr. 388). Yesterday, I made reference to certain proceedings before the Commission. One related to the terminal charges at Peoria dealt with in Docket 14534, 115 I. C. C. 469. Another was Docket 19918 (Tr. 389) reported at 146 I. C. C. 171.

Examiner Smith: Now, gentlemen, is that the case?

Mr. Towner: That is all as far as we are concerned.

Mr. Aber: We have nothing further.

Examiner Smith: Very well, briefs will be due January 15. The hearing is closed.

[fol. 118] Hearing at Chicago, Illinois, April 21, 1931

COLLOQUY

Examiner Smith: In this case, Division 5 of the Commission issued its report and order on November 28, 1930. On February 21, 1931, defendants petitioned for a postponement of the order, for rehearing, reargument and recon-

sideration by the entire Commission. On February 24, 1931, the Commission entered an order which was preceded by an order dated March 9, 1931. The latter order reopened the case for rehearing and indefinitely postponed the effective date of the order made November 28, 1930. The case was then set for hearing on this date (Tr. 394).

Mr. Towner: I assume that it is up to the defendants to proceed.

Examiner Smith: I am inclined to be with you this time.

Mr. Aber: In the petition filed by defendants it was alleged that there has been a material change in the corporate and financial status of the complainants (Tr. 395). It is more or less a matter of common knowledge since the record was made in this case that the Alton Railroad Company has filed a petition with the Commission asking its approval of the acquisition and operation of the railroad and property formerly owned by The Chicago and Alton Railroad Company. That petition was filed concurrently with the petition of the Baltimore & Ohio, asking the Commission to approve its acquisition of the entire capital stock (Tr. 396) of The Alton Railroad Company.

Mr. Towner: It is not necessary that the petitions be offered in evidence. Since the date of the last hearing and since the decision of the Commission there has been a sale of the property of The Chicago and Alton Railroad Company under foreclosure sale, in the District Court of the United States for the Northern District of Illinois. On that [fol. 119] sale the property was sold to two individuals. Thereafter a decree was entered in the District Court approving the sale and the subsequent transfer of the property of The Chicago and Alton Railroad Company to The Alton Railroad Company, subject to the Commission's approval. The applications referred to by Mr. Aber have been filed with the Commission and hearings on them are now in progress (Tr. 397). If those applications are granted the property of The Chicago and Alton Railroad Company, now operated by the Receivers, will be operated by a new company called The Alton Railroad Company, the capital stock of which will be owned by the Baltimore & Ohio Railroad Company.

Mr. Aber: That is correct (Tr. 398).

Mr. Aber: Our information is that on April 3, 1931, the District Court referred to entered a decree and final order concluding the receivership.

Mr. Towner: It did enter such a decree but the decree did not discharge the receivers who are still operating the property pending the outcome of the applications filed with the Commission (Tr. 399). The effect is that the new Alton Company, assuming the applications to be granted, will succeed to the ownership and operation of the railroad property and to all rights that the receivers have acquired or had, and will also assume responsibility for all of the receivers' obligations that accrued during the period of the receivership.

Mr. Aber: I think we can agree substantially as you have stated (Tr. 401).

Mr. Towner: I will agree with Mr. Aber that the applications specified have been filed with the Commission and that they are now on hearing.

Mr. Aber: That would be satisfactory to us (Tr. 404).

[fol. 120] Mr. Aber: I would like to have the right to offer for the record, as soon as it can be secured, certified copy of the evidence of President Willard of the Baltimore & Ohio Railroad Company, offered at the hearing in Finance Docket No. 8657, commenced in Washington April 3.

Mr. Towner: That is entirely agreeable to me (Tr. 407).

C. C. Plummer, having previously testified, was recalled and testified as follows:

I am the same Mr. Plummer who testified at the prior hearing in this case and am familiar with the report and order made by Division 5 herein. Based thereon, I have made further investigation of the rates in issue and have prepared some additional testimony and exhibits (Tr. 408).

My first exhibit will be numbered 32. As I have testified, the equalization basis of rates on grain and grain products from points in Western Trunk Line territory and the Northwest to points in Eastern territory, via Chicago, Peoria and St. Louis, was established by Circular No. 129 of January 30, 1905, introduced as Exhibit 27. That circular provided that the western roads should not receive more than their local or authorized commodity rate. My Exhibit 32 shows present rates on grain products in carloads from the Missouri River and Minneapolis to Chicago and Peoria, with the excess over the tariff rates which would accrue to the western lines under the decision in this case. It also shows

the amount under the tariff rate which would accrue to eastern lines on traffic to New York. I have used the grain products rates because most of the traffic moving under the rates here involved (Tr. 409) consists of animal and poultry feed moving from Peoria at the grain products rate. New York is typical of destination territory. The item of 16 cents in the first line of the second column of the exhibit is the rate [fol. 121] from Kansas City to Chicago. The next rate shown is 14 cents to Peoria, a difference of 2 cents. In the third line the rate from Chicago is shown as 30.5 cents and from Peoria, 32.5 cents, a difference of 2 cents. Thus, the rates from Kansas City to New York equalize through Chicago and Peoria, a matter covered by Exhibit 27. The rates shown on Exhibit 32 are local or authorized commodity rates (Tr. 410) and are all authorized under the Joint Rate Committee Circular basis. The rate from Chicago is a reshipping rate, and the rate from Kansas City to Chicago is the local rate. The exhibit also shows the division to the lines in and out of Chicago under the basis heretofore prescribed in this case. Under that decision, the Alton would receive its local rate of 14 cents from Kansas City to Peoria, plus a division of the rate east, or a total amount from Kansas City to Chicago of 20.5 cents, 4.5 cents more than the local rate of the Alton from Kansas City to Chicago. The Eastern lines would receive 4.5 cents less than their reshipping rate. On Northwest traffic the Western lines would receive 6.1 cents greater than their local rate to Chicago and the lines east would receive the same amount less than their reshipping rate. The lower section of the exhibit shows the same facts with respect to export rates to New York (Tr. 411). On this traffic the lines west would get 3.3 cents more than their local rate on traffic from Kansas City and 4.9 cents more on traffic from the Northwest. The division of rates as shown in Exhibit 32 are typical of rates from the territories as a whole on grain and grain products. Generally, divisions of rates on all traffic restrict a line to its local rates to and from junction points as maximum. The rates involved in this proceeding from Peoria are only a niche in the grain rate structure from Western territory to the East. The roads west of Chicago have been considered Western lines. The Rock Island is a Western line and the Alton must be treated as a Western

line. Otherwise a change in the present method of dividing [fol. 122] the rates will bring serious trouble with other Western lines (Tr. 412). It cannot be treated as an Alton matter alone.

I have also prepared some testimony dealing with the Commission's statement that the Alton in effect originates this traffic. The rates here sought to be divided are published in Jones Tariff 245-D, which is Exhibit 1. Page 174 of this tariff shows domestic rates on grain products from Peoria to Eastern points in rate group 110-A. The 30.5 cent rate is shown as in effect on Northwest traffic from Chicago and Peoria to New York and 32.5 cents on Trans-Mississippi traffic from Peoria to New York (Tr. 413). My testimony goes to the point that these rates are not applicable on traffic originating at Peoria. Apparently we did not make that clear to the division of the Commission. The rates on page 174 of Exhibit 1 apply as follows:

"Applies on shipments originating in trans-Mississippi River Territory, Northern Iowa Territory, Illinois-Iowa Territory and Northwest."

I have omitted reference to the notes describing the origin territories (Tr. 414). On traffic originating at Peoria the rate to New York would be the domestic rate on grain products which is 42 cents, as shown on page 173 of Exhibit 1. This is the rate from the Peoria group. That is group 110 and covers only local rates from Peoria and points taking the same rates. Group 110-A shows rates from Peoria applying on shipments originating in the territories west thereof. A shipper does not have to use transit at Peoria to avail himself of these rates, as a shipment moving from Kansas City to New York would be subject to the reshipping rate from Peoria because it originated beyond Peoria (Tr. 415). What I have said with respect to the domestic rates on grain products is also true with respect to the same rates on grain and grain by-products shown in the same tariff. Most of the traffic moves under the grain products rates. Most of the traffic here involved was transit traffic consisting of grain, etc. moving into Peoria, manufactured and moving out as feed.

[fol. 123] In Item 60 on page 6 of Exhibit No. 9, Paragraph (b) provides:

"When the commodity covered by the inbound billing matched against the outbound shipment originates at a point from which there is no joint through rate to the final destination applicable via the transit point, the rate will be the local reshipping or proportional rate lawfully applicable from the rate making point directly intermediate between the point of origin and the transit point in effect on date of shipment from point of origin, and upon which the through rate would be based if the shipment had not stopped for transit privilege, except that where the commodity covered by the inbound billing matched against the outbound shipment, consists of grain or grain screenings, the rate to be applied on the outbound shipments will be that applicable to grain products in effect at the time the grain or the grain screenings originated."

Under this rule a shipment must originate at a point beyond Peoria to get the reshipping rate from Peoria, and the rate applied is not necessarily the rate in effect when the shipment moves from Peoria but is the rate in effect on the date the shipment moved from the initial point of origin, no matter where it is. The Alton in its Tariff I. C. C. A-1913, which is not in the record, applying on grain and grain products between Chicago, Peoria, East St. Louis, etc. and St. Louis, Missouri, and stations on the Alton and connecting lines in Illinois (Tr. 417) defines the local rate. It is on page 4 of Supplement 8, in Item 87.

Item 87 covers rates on feed, as described, from Peoria, East St. Louis and several other points in Illinois, and the note relates to clam, mussel or oyster shells and reads as follows:

"Where proportional rates are used, and transit granted at such proportional rate points, constituents other than designated above will be subject to the local (flat, not proportional) carload rate from said transit point on the prepared feed shipped."

The destinations named in the item are Brighton, Girard, Greenville, etc. (Tr. 418). The significance of that is that the Alton in its own tariff distinguishes between local and proportional rates. Under that argument if these shipments are local from Peoria, the legal rates would be the

local rates on all of the traffic involved. The title page of Exhibit 1 reads:

[fol. 124] "Local joint and proportional rates applying on grain, grain products and by-products of grain."

The local rate is 42 cents and the proportional anywhere from 30.5 cents to 32.5 cents (Tr. 419). The word "proportional" does not appear on the pages I have referred to naming the rates.

On page 116 of Exhibit 1, in index No. 24870, it reads: "Proper Group 110, proportional group 110-A." The rates are proportional rates applying only on traffic originating beyond Peoria (Tr. 420).

I also have evidence dealing with the importance to the public of the transportation service rendered by the complainant in this case. Several railroads operate between Peoria and Chicago, particularly the Rock Island which carries traffic into and out of Peoria. The transportation facilities other than those of the Alton are adequate for the purpose. The service accorded on this traffic by the lines east of Peoria is the same, whether the traffic moves under the local rates or under the proportional reshipping rates.

(Said document was received in evidence as Defendants' Exhibit 32 and is certified to this court) (Tr. 421.)

Cross-examination:

Exhibit 27, which is Joint Rate Committee Circular 129 was referred to by me in connection with my Exhibit 32. It fixes divisions on grain only to the extent that it restricts the lines to their local or authorized rates as maximum. Its primary purpose was the establishment of the equalization basis of rates on grain (Tr. 422). Paragraph 6 on the back page refers to through rates made by combination through Peoria, Chicago and East St. Louis from Trans-Mississippi River territory. Peoria is not in Trans-Mississippi River territory, but my point is that the rate from Missouri River points to Chicago is one integral rate. If that is not correct, then Exhibit 27 does not apply in connection with the exceeding of the locals, but as long as [fol. 125] the rule in Paragraph 6 of Exhibit 27 stands, it would have the same effect, regardless of how the rates

are made. The divisions the Commission has allowed on traffic from Peoria does not exceed the local rates of the Alton from Peoria to Chicago (Tr. 423). I only get an excess over the local rate by going back to the point of origin of the grain in Trans-Mississippi territory, and assuming a through shipment to Chicago. The division of such a rate fixed by Exhibit 27 contemplates a transit at Peoria or other places and the changing of the character of the commodity. That does not appear in Exhibit 27, but the rates established under the exhibit are subject to rules of individual carriers as to transit, switching, storage, etc.

The language in Paragraph 4 of Exhibit 27 reading:

"It will not be permissible for any western road to take Missouri River grain destined to or via Chicago or Chicago junctions and re-bill such property at an intermediate gateway for the purpose of increasing their revenue,"

is to avoid billing on the part of the western roads to confuse the accounting department and get more than their local rate to Chicago (Tr. 424). On a shipment from Trans-Missouri River territory to Peoria over the Rock Island and moving out of Peoria over the Rock Island to Chicago, and over my railroad east, the Alton can participate in the earnings west of Peoria by agreeing with the Rock Island on a division of the rates from the Missouri River to Chicago. If you have a case, I think your remedy is to go to the Rock Island and have them give you part of the rate that they earn by hauling the grain into Peoria. I do not know whether or not you have that remedy, and I doubt if the Rock Island would do it (Tr. 425).

Examiner Smith: The only way in which a movement could occur as I recall it, under Exhibit 1, would be for the [fol. 126] grain or its products to move from the Missouri River to Peoria and then move out by any of the lines on a joint through proportional rate to New York. The rate would be made from Peoria to New York (Tr. 426).

The Witness: There are some joint through rates from either Trans-Mississippi or Northwestern territory to Chicago applicable through Peoria and the Alton. I think it is Northwestern territory and the rates are applicable

in connection with the Minneapolis & St. Louis. The bulk of the traffic transited at Peoria originates on lines other than the Alton and all of them except the Minneapolis & St. Louis have their own rails to Chicago. Those roads have the greatest claim to this traffic. If they want to, they can make their rates applicable to Chicago via Peoria and the Alton, and divide with the Alton, and we think that is the remedy rather than trying to get anything from the eastern lines.

My statement boils down to a complaint against the publication of transit rates via Peoria via those railroads (Tr. 427). The rates, however, are published that way. The rates here involved are in effect from Peoria to New York with transit at Peoria, but if the Peoria combination had not been revised so as to be the same as the Chicago combination, the Alton would be out of the business unless it became a party to the rates of the western lines to Chicago via Peoria. The Alton gets in on the business because of the rate equalization (Tr. 428). The complaint here would be cured if the Commission would dismiss it, and there is no need to change the rates at all. The Rock Island, for example, serves Trans-Mississippi River territory at Peoria and Chicago with its own rails (Tr. 429). It publishes these rates on Trans-Mississippi River grain with transit at Peoria and Chicago. If the Rock Island, for example, would limit the application of the transit privilege to ship-
[fol. 127] ments moving via Chicago and eliminate transit at Peoria, our complaint against the order of the Commission would be cured, but we have no objection to the transit rates applying through Peoria so long as we get proper earnings east of Chicago. St. Louis is also an equalizing point with Peoria and Chicago, but I doubt if there is much traffic moving through St. Louis (Tr. 430). I do not know whether or not we get 30.5 cents east of Chicago in connection with all roads between St. Louis and Chicago. If it moves from St. Louis to Chicago via a western road, we should get 30.5 cents. The Chicago & Eastern Illinois Railroad is a Central Freight Association line, but I do not know that on traffic handled by it to Chicago we get less than the Chicago reshipping rate. I cannot tell without checking. The Alton is not an eastern line in connection with this traffic (Tr. 431) because the dividing point be-

tween eastern and western roads is Chicago. I say that because the Chicago combination is the established basis for the rates and Peoria and St. Louis rates are simply equalized at Chicago. The rate of 32.5 cents from Peoria to eastern territory is the same whether it moves through Peoria, Joliet and Chicago and is one rate. It is a combination of an eastern and western rate. It is published by Agent Jones for account of the western roads such as the Rock Island, North Western and Alton (Tr. 432) and for account of all eastern lines. I say that a road which participates in transportation under a rate applying from Peoria to New York is not an eastern line because of the way in which the rates have been made. That is not my only reason, as the Alton runs from Kansas City to Chicago and is a western road. To show on Exhibit 32 that the Alton under the Commission's order gets more than its local rate, I have gone back to the rates from the Missouri River and Minneapolis. It is only by doing that [fol. 128] and by taking through transportation from those points to Chicago that I can produce earnings which, under the Commission's order, exceed the local rates (Tr. 433). For the purpose of this comparison, I designate as a local rate the rate from the Missouri River to Chicago which permits transit and further transportation from New York under the reshipping rate. I call that a local rate but say that the reshipping rate from Peoria is not a local rate. I do not think that frequently divisions properly exceed local rates and do not know that the Commission has recently approved such divisions (Tr. 434). I think the public would be adequately served without the Alton from Peoria to Chicago as our investigation shows that 75 per cent of the traffic involved in this case (Tr. 435) moves from Peoria to Chicago via the Rock Island. The Alton gets the small end of the traffic today. I did not know that that was not objectionable to the Alton as it was losing money on all shipments that it handled and did not give much thought to the fact that the situation might change if it had a proper division of the rates. The Pennsylvania has a line of Railroad to Peoria and can haul the traffic from Peoria all the way to the eastern territory. The Michigan Central has no line to Peoria. The Big

Four has a line to Peoria but the Grand Trunk Western does not reach Peoria (Tr. 436). Roads like the Grand Trunk Western and Michigan Central would have to have some Peoria to Chicago line if they participated in the traffic. That would be true of every eastern line that does not serve Peoria with its own rails. The Pennsylvania would not originate the traffic at Peoria and turn it over to the Grand Trunk or Michigan Central at Chicago (Tr. 437). If routes such as the Rock Island, Illinois Central and Alton were eliminated, this traffic would be confined to lines like the Pennsylvania that have their own rails from Peoria direct to the east.

[fol. 129] I said that on grain reshipped from Peoria over the Alton, the Pennsylvania performed the same service as on grain transited at Chicago and reshipped from there over the Pennsylvania. On such a car transited at Chicago we might or might not have to furnish a car for the outbound shipment. The inbound carrier might furnish it (Tr. 438). If the transit point was on our line, we would furnish the car for the outbound shipment. We do not furnish such a car on traffic transited at Peoria and which comes to us from the Alton at Chicago. We might, however, have to absorb an intermediate switching charge which would amount to as much as the originating service. The service at Chicago varies greatly and it is hard to say what difference there would be in handling the two kinds of traffic. In some cases it might be more favorable to take it from the transit house at Chicago rather than from the Alton. I said that we perform the same service from Chicago, but I speak merely of the hauling (Tr. 439). The only difference in the entire service of the Pennsylvania might be in the terminal service from Chicago. I do not concede that on a shipment transited at Peoria and delivered to us at Chicago by the Alton we perform any less service than we would on a shipment transited at Chicago on which we perform a terminal service and furnish a car, but I would have to investigate and see what the services are. I know that on some traffic from the Northwest the proportional rates from Peoria are not applicable via Chicago. I am not sure which ones (Tr. 440). I see no reason why similar restriction should not be made on rates on grain products. Such a restriction was in effect some years ago, but I could not find why it was dropped. There is not as great reason

for limiting the application of the rates from Trans-Mississippi River territory as the routes from that territory are more direct from Peoria than they are from the Northwest. The statement made by Commissioner Porter [fol. 130] in his dissenting opinion, on page 608 of the Commission's report, is correct, I think. It is that the proportional rates from Peoria apply over the Alton, not only via Chicago but also junctions south of Dwight, such as Chenoa (Tr. 441) to which the haul of the Alton is shorter than to Dwight; that it was not necessary for the traffic to move over the Alton via its northern junctions but that it should and can move through junctions south of Dwight; that prior to the present rate equalization, the joint rates from the Northwest to eastern destinations did not apply via Peoria on traffic through Chicago, and that on grain and grain products from the Northwest the proportional rates from Peoria do not apply via Chicago. That statement was the principal reason for my evidence that participation by the Alton in this traffic is not necessary in the interest of the public. The facts stated in that paragraph are correct (Tr. 442). I do not know whether or not the eastern lines, in connection with my line, filed a tariff with the Commission some time ago proposing the cancellation of the rates on Northwestern grain via Peoria, nor do I know that the tariff was withdrawn voluntarily on the hearing.

Examiner Smith: I do not think the record shows whether or not there is a movement of grain through Peoria which is transited there and moved to the southeast. Is there such a movement? (Tr. 443.)

Mr. Towner: The record does not show that because it is not in issue.

The Witness: But there is a movement of grain products through Ohio River crossings. I cannot say whether there is any movement of these products to the east through junctions such as Chenoa, but there is a movement from Peoria to Trunk Line territory via our line. The movement from Peoria through Chicago is generally to New England and points in the northern part of Trunk Line territory. We [fol. 131] found very little movement to the southern part of Trunk Line territory, and I think that to that territory the movement from Peoria would be south via the Pennsylvania direct, or via the Alton and its eastern connections (Tr. 444). The tariffs will not show routing restrictions

and do not know what arrangements there are for dividing rates but the rates would be applicable out of Peoria by the Alton going to the east and southeast and thence by the Baltimore & Ohio Railroad.

J. A. BEHRLE, having been previously *testified,* was recalled and testified as follows:

I have testified in this case before (Tr. 445). The Alton is still in receivership as it was at the time of the last hearing. Joint Rate Committee Division Sheet 145, in evidence as Exhibit 2, shows that in dividing revenue from 110 per cent points, which include Peoria and Pekin, the percentage to Chicago, Blue Island, East Joliet, Kankakee, Joliet, Seneca, Dwight, Mazon, Gardner, Essex, Streator and Bloomington is 20 per cent. I understand defendants' contention to be that if 20 per cent to Chicago is proper (Tr. 446), less than that should have been prescribed by the Commission for application to Joliet and Dwight or that the Commission should have used an average distance in fixing the Alton division. The exhibit in question makes no distinction with respect to length of haul, but recognizes the propriety of a 20 per cent division from Peoria to Chicago, Joliet and Dwight, not only on the Alton but for similar hauls of other lines. To prove this, I wish to introduce Exhibit 33 (Said document was received in evidence as Complainant's Exhibit No. 33 and is certified to this court) (Tr. 447). The exhibit shows that the 20 per cent division is given eastern lines for similar hauls under the same division sheet. From Peoria northbound the 20 per cent is recognized as a minimum division under the exhibit. The eastern lines also do not concede that for the haul to Dwight and Joliet the same divisions are applicable as to Chicago [fol. 132] but are willing to consider Peoria representative of the origin territory, although Pekin is 9 miles south and west of Peoria. The destination lines also make arbitrary deductions for hauls considerably less than the minimum haul involved in this case. A number of shipments from Peoria move to New Berlin, New York, on the Unadilla Valley Railway. That line is 20 miles in length and on those shipments a deduction of 5 cents per hundred pounds was

made before prorating. On shipments to Montrose, Pennsylvania, the Delaware, Lackawanna & Western deducts 5.8 cents per 100 pounds before prorating and divides the balance east of Chicago on agreed percentages. On business to East Bangor, the same road deducts 6.8 cents per hundred pounds before prorating, subdividing the balance on agreed percentages. A proportion of 20 per cent from Peoria to Chicago is, therefore, lessened by the arbitrary deductions made from the through rate, the balance of which is prorated. These are merely illustrations and do not comprise the extent of the eastern deductions. The Alton is an originating and not an intermediate line on the traffic in question. This question was carefully gone into at the first hearing (Tr. 449). On business from Peoria the Alton performs the service of an originating line, and the line receiving the traffic at Chicago, Joliet or Dwight is an intermediate road. On a shipment handled through mills at Chicago, the outbound line would be the originating line. There is a vast difference between shipments milled at Peoria and delivered to Eastern lines at Chicago junctions and shipments from mills in Chicago. In the case of Peoria shipments, the Alton performs the originating service and the eastern roads are relieved of that expense. I am familiar with the situation that would obtain on shipments transited at Peoria and Chicago. There is a substantial difference between the service performed by an eastern line on a shipment transited at Peoria, hauled to Chicago by the Alton and [fol. 133] there delivered to the eastern lines and on a shipment transited at Chicago in which the eastern line occupied the position of originating carrier (Tr. 450). On the Peoria traffic the Alton performs all of the service of originating the freight and the eastern line performs an intermediate service. In some cases it is a terminal line but as a general proposition the line receiving the traffic at Chicago hauls it to the line on which delivery is made. On a shipment transited at Chicago, the Pennsylvania, for example, in hauling the shipment out of Chicago would have to perform all of the service of originating the business. That would be substantially greater than the service it would perform in receiving the car from the line hauling it there. On cars transited at Chicago its service would more closely approximate the origin service at Peoria (Tr. 451). On ship-

ments handled by the Alton from Peoria to Chicago and there delivered to the eastern line more is involved than the absorption of switching charges which are usually paid by the delivering line, except the Elgin, Joliet & Eastern through Joliet. At Chicago proper, the Peoria line would make the delivery. All the eastern line has to do is take the car and haul it on. The local rates of the Alton from Peoria to Chicago are 11.5 cents on grain, grain products, feed, livestock feed and poultry feed. These rates are contained in Alton Tariff I. C. C. A-1913. Joint Rate Committee Circular 129, which is Exhibit 27, only applies to through rates on grain from points west of the Mississippi River and does not apply to this case, as this case concerns the division of rates from the Peoria District to East St. Louis (Tr. 452). I am familiar with Exhibit 27 and certainly the basis of divisions prescribed by it does not apply to a shipment of grain originating at Kansas City, brought to Peoria and there transited, in connection with an outbound shipment from Peoria of a different commodity via Chicago to the east. The circular was designed to cover a case where [fol. 134] the western line might seek to take a proportional rate to a junction point, plus the division of the rate for transportation beyond the through movement. I have in mind that the Alton, for instance, could take a shipment of grain originating beyond Kansas City and haul it from Kansas City to Bloomington. It could then rebill the shipment from Bloomington and take a division of the Bloomington rate from the eastern line. That would be a shipment in continuous movement and the division sheet was designed to prevent that practice (Tr. 453). The division sheet primarily applies to continuous movement shipments and refers particularly to rebilling of shipments. In Docket 15234, the Interstate Commerce Commission approved divisions to the Western Trunk Lines higher than their local rates, although the eastern lines contend that they should receive the same divisions on all shipments of grain, grain products or by-products from Chicago to Eastern Trunk Line territory. The local rate of 36 cents on grain by-products from Peoria to New York is divided by the eastern lines without question on the basis of the merchandise percentages, or 20 per cent west and 80 per cent east (Tr. 454). This gives the eastern lines 28.8 cents and they accept this division. In dividing the lower proportional

rate from Peoria of 34.5 cents they say they should receive 30.5 cents east of Chicago. On the question of the necessity of Alton transportation from Peoria to Chicago, attention is directed to the report of the Commission in 146 I. C. C. 171. I also call attention to the proceedings before the Commission in I. & S. Docket 3478, in which a hearing was held in Chicago on July 15, 1930. At this hearing the Chicago Board of Trade, the Co-Operative Grain League Federation Exchange and the Allied Mills, Inc. were protestants (Tr. 455). The case involved the cancellation of rates from Peoria and Pekin on grain and grain products to Eastern Trunk Line territory via Chicago. The tariffs [fol. 135] undertaking to cancel the rates were suspended by the Commission on June 24, 1930. The respondents had wired the Commission asking a postponement of the hearing. The Commission denied that petition and the carriers withdrew the tariffs, although the protestants were prepared to proceed. No other attempt has since been made by the eastern lines to file the cancellation. That case involved the cancellation of these rates from Peoria involved in this case, in connection with traffic moving from Northwestern territory. The proposed cancellation was filed by the Eastern Trunk Lines but was withdrawn prior to the hearing. We were not consulted (Tr. 456). The record already shows that the route from Peoria to the east, via the Alton, is more direct than that of other lines. Taking the distance from Peoria to Buffalo, I found the Alton route shorter than any of the direct lines. Another point of importance is that in dividing proportional rates on grain and grain products from East St. Louis to Eastern Trunk Line territory the lines between East St. Louis and Chicago receive their local percentage of the reshipping rate from East St. Louis to New York. This percentage is contained in Joint Rate Committee Circular 145 (Tr. 457). That circular is in the record as Exhibit No. 2. To show that this basis is used not only by the Alton but by other roads, I refer to Sheet 2 of Division Sheet 1 to Chicago & Eastern Illinois Railway Company Tariff 2300 Series. Proportional rates from C. & E. I. Railway stations Danville, Illinois, Granite City, Illinois, to St. Louis, Missouri, inclusive, and Thebes, Illinois, will divide on basis of merchandise percentages. This shows that the eastern lines contend for a different basis of divisions from Peoria via Chicago (Tr.

458) than is applied on the same character of traffic from East St. Louis via Chicago to Eastern Trunk Line territory. The C. & E. I. is a member of the Central Freight Association which is seeking to impose on the Alton the provisions [fol. 136] of its Divisions Sheets 226 and 226-A. The rate on grain products from Trans-Mississippi River territory from Chicago to New York is 30.5 cents. From St. Louis or East St. Louis to New York, the reshipping rate is 34.5 cents. The latter rate divides by allowing the lines from East St. Louis to Chicago 23 per cent which is 7.9 cents. This allows the lines east of Chicago 26.6 cents so that on traffic moving via St. Louis over the C. & E. I. from St. Louis to Chicago the eastern lines instead of taking the Chicago reshipping rate accept 26.6 cents. That is not limited to C. & E. I. The Alton does the same thing (Tr. 459). It gets the same division as the C. & E. I. We deny that it has been the recognized custom for the eastern lines to get their reshipping rate from Chicago. On August 1, 1927, at a meeting attended by the Pere Marquette, Big Four, Pennsylvania, Grand Trunk, New York Central, Nickel Plate, Michigan Central, Baltimore & Ohio, Wabash and Erie, it was recommended that in dividing the Peoria reshipping rates on grain when applicable via Chicago, the Peoria-Chicago lines would not be allowed proportions in excess of the beyond special or connecting line per cents. That resolution constituted a limitation to the reduction of the division previously allowed and originated upon complaint of the Peoria-Chicago lines that the eastern lines were not giving them their local percentages in all cases. The eastern lines then restricted the Peoria-Chicago lines to their connecting line percentages (Tr. 460). They then decided that the eastern lines should receive their reshipping rates which gave them still more. The division of the local rate on grain products from Illinois was discussed by the Commission in 28 I. C. C. 559. In that case the Commission found that the Illinois railroads should have more money, and those divisions have been fixed by the Commission. Prior to the time the proportions on Illinois grain were fixed in specific amounts the through rate was divided on merchandise percentages and the Illinois roads allowed a spe-
[fol. 137] cific amount in cents per one hundred pounds in addition to the percentage to compensate them for originating the grain in their local territory. The rates on grain

from local Illinois territory to Eastern Trunk Line territory are distinct from the reshipping rates from Peoria. The revenue received by the Alton on its local grain is a mainstay of the railroad (Tr. 461). The reshipping rates are much lower than the rates on local grain and grain products. The local rate on grain products from Peoria to New York is 42 cents and the reshipping rate on Trans-Mississippi River grain products is 32.5 cents. This distinction in rate justifies a difference in the basis of divisions. It is not apparent why the eastern lines should get the same earnings on their haul from Chicago to New York on all traffic. On grape-fruit from Texas to Chicago the Alton receives for its haul from Kansas City to Chicago 38 cents per 100 pounds, but on grape-fruit from California to Chicago it gets 25.5 cents per 100 pounds for the haul from Kansas City to Chicago. The Alton performs the same service in both instances. I cite this case as two illustrations and thousands of other illustrations could be made. The division on the Texas traffic has been fixed by order of the Commission (Tr. 462) and a recent report of an Examiner holds that our division on California traffic is proper. If the eastern roads are right, we do not see why we should not receive the higher of the two divisions for our haul from Kansas City to Chicago. We frequently haul the same commodity between the same points, giving the same service, but in different cases receive different amounts in the division of the through rates. That is the situation that is presented on this movement from Chicago to New York. The cause of it often lies in the volume of the rate to be divided, which is usually the main cause (Tr. 463). I have pointed out that the eastern lines will take the local by-products rate from Peoria (Tr. 463) divided on percentages, and that division gives them a much lower division than they anticipate in a [fol. 138] division of the lower grain products rate from Peoria to the east.

Cross-examination (Tr. 464):

I would not subscribe to the proportion that a line should be restricted to its local rate. I do not say that we ought to get more than our local rate here but we are not getting it even under the basis fixed by the Commission. I say that even if we were getting more than our local rate, the Commission has already held that the local rate should be

disregarded. I say the question does not come in here because we do not receive our local rate (Tr. 465). We are not exceeding our local rate. I would say that generally in dividing revenue on a through shipment the local rate should be disregarded. Either side might get more than the local rate under a proper method of divisions. I would divide the through rate and that would settle the question (Tr. 466). I do not say that the principle that a railroad could get more than its local rate could apply to both parties to a division because if one side gets more than its local, the other side cannot get its local. In determining which should get more, you get down to the merits of the division. In dividing a joint rate between its lines, both of them cannot get more than their local rate. I referred to I. & S. proceedings held in Chicago last summer, in which the eastern lines proposed to restrict the Chicago route on transited traffic from Peoria (Tr. 467). As I recall it, the proposed restriction applied to everything but only on traffic originating in the Northwest. I think grain products is the one commodity on which those rates are now applicable to Chicago out of Peoria. I think they have been excluded on grain. We are very seldom consulted when the eastern lines wish to change the rates from Peoria. When they withdrew the rates in I. & S. Docket 3478 they did not say anything to us. That is the case in which the tariff was withdrawn (Tr. 468). I said that at a meeting of the eastern lines in 1927 a record was made to the effect [fol. 139] that the originating lines out of Peoria should not receive more than their connecting line percentage. They made that record and gave us a copy of it but never reached the form of a division sheet. The lines east of Chicago subsequently decided to take their reshipping rates and that would have reduced our earnings. The application of the connecting line percentages reduced our earnings as in numerous cases the Eastern Trunk lines were giving us the local percentages (Tr. 469). We protested when some of them reduced us to the connecting line percentages. Prior to the time that the Eastern Trunk Lines put in the connecting line percentages, the Alton had been getting divisions which allowed the eastern lines less than their Chicago reshipping rate. When the connecting line percentages were put in that still left the eastern lines receiv-

ing less. They only received their reshipping rate when they set that up as a minimum but prior to that they had been accepting less. Prior to that time the 20 per cent was allowed us generally (Tr. 470). Barring cases in which the delivering lines in some instances settled on the basis of connecting line percentages, the local division of 20 per cent was allowed. I imagine that the eastern deductions accrued to the delivering lines. Those deductions shrunk the divisions of the eastern carriers to the same extent that it shrunk the Alton divisions (Tr. 471). The difference in the service rendered by the Eastern Trunk Lines on traffic originating at Chicago versus traffic received at that point in interchange from lines originating at Peoria, lies in the entire transaction. There is a difference between taking a car from a connecting line, putting it in your yard and setting it into a train, than there is to go to the individual industry with a car, place a car for loading and then pick it up later on. In addition to making a trip to place the empty, you would have to take the shipment from the industry to the yard, which is usually the same yard at which a carrier receives its freight from the connecting line. In [fol. 140] receiving a car from a connection, the car is already on the interchange track. In the other case you would have to go to the industry, place the empty, return empty-handed perhaps (Tr. 472), then go back for the load, pick it up and carry it back to the yard where the train is made up.

Mr. Towner: That is all we have, your Honor (Tr. 473).
Examiner Smith: Briefs will be due January 15, 1931.

(Whereupon the hearing of the above entitled matter was closed.)

Whereupon the following proceedings were had in the District Court:

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Towner: I wish to put upon the record an agreement which I had reached with Mr. Aber. On page 3 of the petition, there is an allegation that the Alton (R. 92) Railroad Company has succeeded to the rights, duties and

obligations of the receivers of the Alton with respect to this suit. In the answers filed by the railroad defendants there was a formal denial of that. I have discussed it with Mr. Aber and he is agreeable to withdrawing the denial of that purely formal allegation, upon my assuring him that I am not asking this court to issue any injunction under the Transportation Act, Section 208-B. I have given him that assurance, and I assume he will withdraw the denial.

Is that correct, Mr. Aber?

Mr. Aber: It is true that Mr. Towner and I had that understanding. Mr. Day, however, is unable to concur on behalf of the defendant in that agreement.

Mr. Towner: That puts me in a rather embarrassing [fols. 141-143] position, because I could very easily have had the various decrees of this court certified and submitted them to the court, if I had known that. I had the assurance of counsel on the other side that that agreement would be made.

Judge Evans: You can make this a part of the record: That the Court, in view of its knowledge of the statement made by counsel, accepts petitioner's statement (R. 93) respecting the termination of the receivership and the assumption of control and operation of the railroad.

Mr. Towner: And the succession of the petitioner in this case to the interests of the receivers therein.

Judge Evans: However, the defendants may have ten days, if it wishes the privilege, within which to enter or make proof that that is not correct, or suggesting to the Court limitations upon this ruling.

Do you get me?

Mr. Aber: Yes.

Judge Evans: In other words, this court is informed of its own knowledge that the successorship has taken place and the transfer has concluded, and if for any reason we are wrong in our impression you call it to our attention (R. 94).

Mr. Towner: It is understood, of course, that this is the final hearing in the case.

Judge Evans: Yes (R. 96).

Whereupon the hearing in the above entitled matter was closed.

[fol. 144] In United States District Court for the Northern District of Illinois, Eastern Division

Equity. No. 11347

The Alton Railroad Company, a Corporation, Petitioner,

vs.

The United States of America et al., Defendants

Findings of Fact and Conclusions of Law—April 7, 1932

Findings of Fact

1. Petitioner is a railroad corporation and a common carrier for hire subject to the Act to Regulate Commerce and owns and operates a line of railroad extending from Peoria and Pekin, Illinois, through Dwight and Joliet, Illinois, to Chicago, Illinois. It was the purchaser at foreclosure sale of all the railways and properties of The Chicago and Alton Railroad Company, a corporation, which were operated from August 30, 1922, until July 18, 1931, by William W. Wheelock and William G. Bierd as Receivers thereof. Under a decree of foreclosure and sale [fol. 145] dated July 6, 1929, a decree confirming sale and approving deed, dated January 8, 1931, and an order discharging Receivers, dated November 9, 1931, all of said orders being entered in the case of The Texas Company, et al., complainants, vs. The Chicago and Alton Railroad Company, et al., defendants, Consolidated Cause No. 2940, pending in the District Court of the United States for the Northern District of Illinois, Eastern Division, petitioner acquired all the right, title and interest of The Chicago and Alton Railroad Company, and of the Receivers thereof, in and to the railways and property of said Railroad Company and succeeded to all their rights, duties and obligations with respect to the subject matter of this suit.

2. All of the defendants herein, other than the United States of America and the Interstate Commerce Commission, are railroad corporations or receivers thereof, and are common carriers for hire subject to the Act to Regulate Commerce, and operate lines of railroad extending eastwardly from Dwight, Joliet and Chicago, Illinois, to what

is commonly known as Eastern Trunk Line and New England territories; and said defendants share in the division of transit rates here complained of.

3. Petitioner and its predecessors in interest and the Railroad Defendants herein have for many years maintained and now maintain by agreement, joint rates applying upon grain, grain products and by-products of grain [fol. 146] moving from Peoria and Pekin, Illinois, via Dwight, Joliet and Chicago, Illinois, to destinations in Eastern Trunk Line and New England territories over the lines of railroad operated by petitioner and said Railroad Defendants. Said joint rates have been and are now on file with the Interstate Commerce Commission, as required by law, in tariffs published for and on behalf of petitioner and its predecessors in interest and the Railroad Defendants herein. Said joint rates are known as "reshipping" rates, in so far as they apply upon grain, grain products and grain by-products shipped into Peoria and Pekin and reshipped from there within twelve months to said eastern destinations, and as "local" rates, in so far as they apply upon said commodities not reshipped from Peoria and Pekin within twelve months after their delivery at those points. Up to July 1, 1929, the predecessors in interest of petitioner received divisions of said joint rates which were presumably satisfactory to them. On July 1, 1928, and February 1, 1929, the said Railroad Defendants of their own motion reduced the divisions then being allowed out of said joint rates to the Receivers of The Chicago and Alton Railroad Company, the said divisions being reduced to nothing on many shipments and to a maximum of two cents per 100 pounds on the balance of said traffic. The Railroad Defendants were able to enforce said reduced divisions upon said Receivers, as they collected the freight charges and distributed them among the railroads performing the entire transportation service.

4. On July 21, 1929, the said Receivers filed with the [fol. 147] Interstate Commerce Commission a complaint against Railroad Defendants herein, alleging that the divisions accorded to them out of said joint rates by the Railroad Defendants, subsequent to July 1, 1928 and February 1, 1929, had been in the past, were then and would be for the future, unjust, unreasonable and inequitable and un-

duly preferential, in violation of the Act to Regulate Commerce, and that said divisions had been and were then unlawful and in violation of Section 208 (b) of the Transportation Act, 1920; which said complaint was received and filed by the Commission under its Docket No. 22487, W. W. Wheelock, et al., Receivers, v. A. C. & Y. R. Co., et al.

5. On November 28, 1930, after hearing, Division 5 of the Commission made its report and order in said case, finding the divisions accorded the said Receivers out of said joint rates to be unreasonable and otherwise unlawful and fixing proper divisions to be accorded said Receivers; and thereafter upon petition filed by the defendants in said case, said order was indefinitely postponed and a rehearing granted and held in said case.

6. On December 7, 1931, the order of the Commission herein attacked was made by a majority of the Commission. In its report the Commission sustained the order previously made as to local rates but made a finding that the divisions then accorded to petitioner and the Receivers out of said joint "reshipping" rates had not been shown to be unjust, unreasonable or otherwise unlawful and entered an order dismissing the complaint thereto.

7. Thereafter, on January 16, 1932, this suit was started [fol. 148] to enjoin the order of the Commission dated December 7, 1931, in so far as it dismissed the complaint as to the existing divisions of the said joint "reshipping" rates, and to enjoin the Railroad Defendants herein from applying and enforcing those divisions against petitioner in the future. Said cause was heard in this court on a motion for a permanent injunction on February 24, 1932, and on said hearing, the entire record made before the Interstate Commerce Commission in the case instituted by the said Receivers was offered and received in evidence and constitutes the only evidence before the court.

8. The Railroad Defendants herein are now applying and enforcing against petitioner the existing divisions of said joint "reshipping" rates held by the Commisson to be not unjust, unreasonable or otherwise unlawful, and said divisions constitute the only revenue received by petitioner for the service performed by it under said joint "reshipping" rates.

9. The Commission's order of December 7, 1931, contains no requirements whatsoever in respect of the divisions of the transit rates.

10. By the Commission's report and order of December 7, 1931, the Alton was granted increased divisions of the non-transit rates from Peoria, its division of 20 per cent of the rate, which in the case of the typical rate of 42 cents on grain products from Peoria to New York amounted to 8.4 cents, having been increased to the specific or arbitrary over the Chicago rate, 11.5 cents, with the balance, 30.5 cents, equivalent to the Chicago reshipping rate, to the eastern carriers. With respect to this, the only affirmative part of the order of December 7, 1931, the Alton makes no complaint.

[fol. 149] 11. The petition of the Alton herein alleges that it is brought to enjoin, set aside, annul, and suspend part of the Commission's order of December 7, 1931, and the petition contains a prayer that an injunction be entered restraining, enjoining, and suspending "the effect and enforcement of said order of the Commission in so far as it is hereinbefore complained of as being illegal," but said order is complained of only in so far as it relates to the divisions of the transit rates, and there is no provision in that order which contains any affirmative requirement in respect of those divisions.

12. The Commission's order of December 7, 1931, places no compulsion upon the Alton either in respect of those through routes and joint rates or in respect of the divisions of said joint rates, or in any other respect.

Conclusions of Law

1. There is no provision in the Commission's order of December 7, 1931, relating to the divisions of the transit rates which can be made the subject of an injunction. In so far as the divisions of the transit rates are concerned the order is negative both in form and in substance. The Alton applied to the Commission for an affirmative order. Its complaint to the Commission asked that the Commission exercise its administrative function and fix the divisions of the transit rates. The Commission found in its

report that these divisions had "not been shown to be unjust, unreasonable, or otherwise unlawful as alleged," and, refusing to exercise its administrative power, declined to grant any relief to the Alton in so far as the [fols. 150 & 151] transit-rate divisions were concerned, and entered a negative order in respect of them.

(2) There is no ground for, and the court is without jurisdiction to issue, an injunction against the eastern railroads, defendants herein, restraining them from continuing the present divisions of the transit rates.

(3) The petition should be dismissed for want of jurisdiction, at the cost of the petitioner.

Evan A. Evans. Walter C. Lindley, District Judge.
Charles E. Woodward, District Judge.

April 7th, 1932.

[fol. 152] In United States District Court for the Northern District of Illinois, Eastern Division

Equity. No. 11347

The Alton Railroad Company, a Corporation, Petitioner,

vs.

The United States of America et al., Defendants

March, 1932

Before Evans, Circuit Judge, and Lindley and Woodward, District Judges

Opinion—April 7, 1932

Lindley, District Judge:

On December 7, 1931 the Interstate Commerce Commission entered an order dismissing the complaint of petitioner in so far as it attacked the legality of divisions of certain joint reshipping freight rates. This order was based upon the finding that—

"the present division of joint reshipping of proportional rates on grain, grain products and grain by-products, in

carloads, from Peoria and Pekin over the lines of complainant to Chicago, Joliet or Dwight, destined to points in eastern trunk lines and New England territories east of Buffalo, are not unjust, unreasonable or otherwise unlawful, as alleged by complainants."

Petitioner now sues to enjoin and suspend said order of dismissal and to restrain defendant railroad companies from making divisions such as those complained of.
[fol. 153] For many years petitioner and defendant railroad companies have maintained agreed joint rates upon grain and its products and by-products from Peoria and Pekin, Illinois, to points east of Buffalo. These rates have been duly published and filed with the Commission as required by law. The greater part of the traffic covered by them originates in the territory southwest, west and northwest of Peoria and after shipment into Peoria remains there in storage or in course of manufacture into products and by-products before being forwarded to the coast. For such traffic the applicable rates, if the reshipments are within twelve months of arrival are called "reshipping" or "Proportional" rates and vary in amount depending upon the section or territory where the shipment to Peoria originates. If the goods are not reshipped within twelve months, the rates applicable are called "local" rates although joint in character.

Petitioner hauls the loadings from Peoria to one of its gateways, Dwight, Joliet or Chicago, and there delivers it to its connecting eastern railroads for further transportation. On July 1, 1928 the eastern lines, over the objection of petitioner's predecessors, established new divisions of the aforesaid joint reshipping rates, reducing petitioner's proportion to a maximum of two cents per hundred pounds in certain instances and to as little as nothing in others. The defendant eastern lines were in a position to enforce this division because they made collections of the joint through rates and could deduct such [fol. 154] proportions as they insisted upon. Petitioner complained to the Commission asserting the unlawfulness of the divisions aforesaid and asking that body to fix proper divisions. The final order of the Commission now complained of, held the division of the local joint rates unreasonable but dismissed the complaint of petitioner as

to the through proportional reshipping rates. It is to the latter part of the order that petitioner objects, upon the ground that the present divisions are confiscatory.

The division of freight rates in the absence of constitutional legislation affecting or regulating same is left as a matter of contract to the carriers, but when in pursuance of constitutional power so to do, Congress creates a body such as the Interstate Commerce Commission and grants to it power to regulate commerce and fix divisions of joint rates, it removes the subject matter from the carriers' jurisdiction and places it within the custody of a body representative of the legislative branch of the government. The power to fix rates or to make divisions of rates is lodged in the legislative branch of the government. Term. R. R. Assn. v. U. S., 266 U. S. 17, 30-31; Keller v. Potomac Elec. Co., 261 U. S. 428, 440; Ohio Valley Co. v. Ben Avon Borough, 253 U. S. 287, 289; L. & N. R. R. Co. vs. Garrett, 231 U. S. 298, 305; Interstate Commerce Com. vs. Humbolt S. S. Co., 224 U. S. 474, 483; Prentis vs. Atlantic Coast Line Co., 211 U. S. 210-226.

While the Interstate Commerce Act gives the Commis- [fol. 155] sion jurisdiction, upon complaint of an aggrieved party or upon its own motion, to interfere with divisions being made, there is no requirement in the Act, in the absence of an order concerning same, that such divisions must be filed with the Commission, or that anything shall be done to make such divisions official acts of the commission or that official endorsement of same be made. Joint rates must be filed with the Commission and when so filed and approved they become matters controlled by official edicts of that body. But divisions, in the absence of relieving orders, are not so filed but are left to and fixed by the carriers themselves. Clearly there must be some administrative order upon divisions, in pursuance of the Commission's legislative power before it can be said that legislation has occurred.

In the present case petitioner, dissatisfied with divisions forced upon it by its joint carriers which afford it only an alleged confiscatory return or none at all and finding itself unable to agree with its joint associates as to any modified divisions of joint rates, made its appeal that the Commission exercise its legislative power, find the existing divisions unfair and fix fair ones. After an examination of

the facts, the Commission found that the divisions were not unfair and dismissed the complaint. It entered no other order, it merely declined to legislate. It did not order the Alton or its connecting carriers to abide by the [fol. 156] previously maintained divisions; it did not direct the future maintenance of the existing divisions; its action was equivalent to saying: "We do not find the situation such that we should fix divisions, that is, we find no reason to exercise our legislative administrative power."

We are now asked to enjoin this order of dismissal. Petitioner appeals to us for a decree against a legislative body enjoining its refusal to enact legislation. Such relief is beyond judicial discretion. The judiciary may not by mandatory injunction force a legislative or administrative branch of the government to exercise its legislative power. Refusal to legislate to prevent confiscation is subject matter over which a judiciary has no jurisdiction.

Suppose the act creating and granting jurisdiction to the Interstate Commerce Commission had never been enacted and consequently the power so to legislate as to fix divisions of rates remained solely in Congress. Then suppose, in the absence of such legislation, petitioner had applied to Congress for legislation fixing new divisions upon the plea that those heretofore enforced by its associate joint carriers are confiscatory. Could it be successfully contended that the judiciary might by any decree interfere with the action of Congress in failing to legislate? It is obvious that the courts would have no such power. "Litigation cannot arise until the moment of legislation [fol. 157] has past" (Prentice v. At. C. L. Co., 211 U. S. 210 at 227). A corollary to this sentence from Mr. Justice Holmes is that litigation is powerless to compel legislation.

This case cannot be distinguished from the decision in Procter and Gamble Company v. United States, 225 U. S. 282. There, a rule had been put in force by the railroad companies and approved by the Commission requiring the collection of demurrage charges upon privately owned tank cars left on sidetracks, even though the sidetracks belonged to the parties owning the cars. Procter and Gamble, owners of such cars, filed a complaint with the Commission, charging that the rule was unjust and would permit the taking of their property without compensation and without due process of law. The Commission found that the

rule was not an unjust one, refused to interfere and dismissed the complaint.

Chief Justice White commented at length upon the character of the order entered. He concluded that the words of the Interstate Commerce Act giving courts jurisdiction of cases brought "to enjoin, set aside, annul or rescind in whole or in part, any order of the Interstate Commerce Commission could mean to apply only to orders granting affirmative relief and that they give to the court "the right to take cognizance, when properly made, of complaints concerning the legality of orders rendered by the Commission and confer power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal." He further said:

[fol. 158] "The statute, therefore, necessarily, while it created new rights in favor of shippers, in order to make those rights fruitful as to the subjects with which the statute dealt, coming within the scope of the administrative unity which we have mentioned, primarily made the judgment of the administrative body to whom the statute confided the enforcement of the act in the respects stated a prerequisite to a resort to the courts. In other words, as to the subjects stated, the act did not give to the courts power to hear the complaint of a party concerning a violation of the act, but only conferred power to give effect to such complaints when, by previous submission to the Commission, they had been sanctioned by a command of that body." * * *

"By a long line of decisions, whereby applications to enforce orders of the Commission were considered and disposed of, or where requests to restrain the enforcement of such orders were passed upon, it appears by the reasoning indulged in that it was never considered that there was power in the courts as an original questions, without previous affirmative action by the Commission, to deal with what might be termed in a broad sense the administrative features of the act to regulate commerce by determining as an original questions that there had been a compliance or non-compliance with the provisions of the act. The subject is illustrated and made clear by the rulings in Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, ante, 863, 32 Sup. Ct. Rep. 535; Robinson v. Balti-

more & O. R. R. Co., 222 U. S. 506, ante, 288, 32 Sup. Ct. Rep. 114; Southern R. Co. v. Reid, 222 U. S. 424, Ante, 257, 32 Sup. Ct. Rep. 140, and Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553; 27 Sup. Ct. [fol. 159] Rep. 350, 9 Ann. Cas. 1075. The latter case especially will serve to point out that where the power of original action by a court, without previous action of the Commission, was insisted upon, it was based upon the conception that the particular subject-matter as to which such power was asserted was, by the express terms of the act to regulate commerce, not embraced within the subjects primarily confided by the act exclusively to the administrative authority of the Commission."

Other cases where the Court has held that similar negative orders entered by the Commission cannot be successfully attacked in judicial actions are U. S. v. Los Angeles R. R. Co., 273 U. S. 299. Lehigh Valley R. R. Co. v. U. S., 243 U. S. 412; Mfrs. Ry. Co. v. U. S., 246 U. S. 482-483. The language of the opinion in the latter mentioned case is directly applicable. There the Court said:

"It hardly can have escaped attention that the real complaint of appellants respecting the order now under consideration is directed not to what the order requires to be done, but to what it does not require. It granted a part of the relief for which appellants had applied to the Commission. Recognizing the Railway as a common carrier to which allowances and divisions might be accorded by the trunk lines, and that through routes were in operation between the Railway and those lines, it fixed the maximum joint rates and went no further for the present. The real ground for resorting to the Courts in this case is the failure to fix divisions." * * * It is settled that this jurisdiction does not permit the court to exercise administrative authority where the Commission has failed or refused to exercise it, or to annul orders of the Commission not amounting to an affirmative exercise of its powers."

See also Term. R. R. Assn. v. U. S., 266 U. S. 17; N. England Divisions Case, 261 U. S. 184; U. S. v. Abilene & Svn. Ry. Co., 265 U. S. 274; Beaumont etc. Ry. vs. U. S., 282 [fol. 160] U. S. 74. Piedmont & Northern Ry. vs. U. S., 280 Ill. 469; Standard Oil Co. vs. U. S., 283 U. S. 235. In the last mentioned case the court said:

"Necessarily the District Court was without jurisdiction under the settled construction of that provisions by which the authority of the court is limited to the review of affirmative orders, with 'power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal.' "

Here there was no duty of obedience to any order from which the court might relieve the petitioner.

While the Commission made no order in respect to these divisions, it did make a finding that they had not been shown to be unjust or unlawful. But that finding is not subject-matter for an injunction. So in U. S. v. Glady, B. & C. R. Co., 282 U. S. 522, it was held that a finding in a Commission report is not an order of the Commission and jurisdiction of a suit to annul it is not conferred upon the statutory court by the Urgent Deficiencies Act.

In the Intermountain Rates Cases, 234 U. S. 476, relied upon by petitioner, the complaint was against existing rates which had been made official by being filed with and approved by the Commission. The order, while negative in form, had the legal effect of fixing certain rates which petitioner in its suit in Court contended were illegal. Hence, the purpose of the suit was to set aside as illegal a completed legislative or administrative act. In U. S. vs. Merchants, etc. Association, 242 U. S. 178, the legal situation was the same as in the case last commented upon. The effect of the order of the Commission was officially to approve and fix certain rates which petitioner attacks as unjust.

[fol. 161] In United States vs. New River Company, 265 U. S. 533, the Court stated that the order complained of permitted and authorized the carrrier to adopt a certain rule and said that "The effect of the order is to grant relief sought by the coal mines." In the instant case, the order does not authorize or permit the divisions complained of, it is merely a refusal upon the part of the Commmission to interfere, and, as the Court said in the last cited case, "the taking of jurisdiction in such cases would involve determination by the courts whether relief denied by the Commission in the exercise of its powers, should be granted." In U. S. vs. Los Angeles Railroad Co., 273 U. S. 299, the

court pointed out that the order was negative because it did not demand the carrier to do or refrain from doing anything, because it did not grant or withhold any authority, privilege, or license, and because it did not change the carriers' future or existing situation, or obligations. The order presently complained of likewise fails to command the carrier to do or refrain from doing anything; does not grant or withhold any authority, privilege, or does not abridge any power or facility.

In view of the foregoing, though petitioner's situation may seem to it harsh, we are unable to find any basis for jurisdiction in this Court. To exercise jurisdiction would amount to the determination of questions which the Commission has refused to consider in its legislative and administrative capacity and which we are therefore not free to consider.

[fols. 162 & 163] This bill will be dismissed for want of jurisdiction. Dated April 7, 1932 A. D.

Evan A. Evans, Circuit Judge. Walter Lindley, District Judge. Chas. Woodward, District Judge.

[fols. 164 & 165] In United States District Court for the Northern District of Illinois, Eastern Division

Equity. No. 11347

The Alton Railroad Company, a Corporation, Petitioner,

vs.

The United States of America et al., Defendants

Final Decree—April 22, 1932

This cause coming on to be heard upon final hearing upon a prayer for a permanent injunction before a statutory court as provided by statute, upon the pleadings and evidence and argument of counsel, and upon consideration thereof,

It is ordered, adjudged, and decreed that the petition herein be and the same is hereby dismissed at petitioner's costs for want of jurisdiction.

Dated this 22nd day of April, 1932.

Evan A. Evans, United States Circuit Judge. Walter C. Lindley, Charles E. Woodward, United States District Judges.

O. K.

J. Stanley Payne, for Interstate Commerce Commission.

O. K.

Elmer B. Collins, for United States of America.

O. K.

J. L. Aber, L. P. Day, for Railroad Defendants.

[fol. 166] In United States District Court

[Title omitted]

Notice of Appeal—Filed April 22, 1932

To Elmer B. Collins, Solicitor for the United States of America; J. Stanley Payne, Solicitor for Interstate Commerce Commission; J. L. Aber and L. P. Day, Solicitors for Railroad Defendants; Oscar E. Carlstrom, Attorney General of the State of Illinois:

You and each of you are hereby notified that on the 22nd day of April, 1932, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, we shall present to the Hon. Evan A. Evans, United States Circuit Judge and the Hon. Walter C. Lindley and Hon. Charles E. Woodward, United States District Judges, the petition of the petitioners herein for an appeal from the final order or decree made and entered in the District Court in the above entitled cause on the 22nd day of April, 1932, to the Supreme Court of the United States, a copy of said petition for appeal and assignment of errors therein referred to being attached hereto; and ask that an order be entered herein allowing said appeal and making the same return-

able within thirty (30) days from April 22nd 1932, a copy [fols. 167 & 168] of said order being also attached hereto.

Silas H. Strawn, Frank H. Towner, Solicitors for Petitioner.

Received a copy of the foregoing notice, together with a copy of the petition for appeal, assignment of errors and order therein referred to, this 16th day of April, 1932.

Elmer B. Collins, Solicitor for United States of America. J. Stanley Payne, Solicitor for Interstate Commerce Commission. J. L. Aber, Leo P. Day, Solicitors for Railroad Defendants. Oscar E. Carlstrom, Attorney General of the State of Illinois.

[fols. 169 & 170] In United States District Court

[Title omitted]

Petition for Appeal—Filed April 22, 1932

To Hon. Evan A. Evans, United States Circuit Judge; Hon. Walter C. Lindley, Hon. Charles E. Woodward, United States District Judges:

Now comes The Alton Railroad Company, petitioner herein, by its solicitors, and feeling aggrieved by the final order or decree of the District Court made and entered herein on to-wit, April 22nd 1932, does hereby appeal therefrom to the Supreme Court of the United States, and prays that its appeal be allowed and that citation be issued as provided by law.

The particulars wherein it considers the final order or decree erroneous are set forth in the assignment of errors on file, to which reference is made. It prays that a transcript of the record, proceedings and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted to the Supreme Court of the United States, and it further prays that a proper order relating to the security to be required of it be made.

Silas H. Strawn, Frank H. Towner, Solicitors for Petitioner.

[fol. 171] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed April 22, 1932

Now comes The Alton Railroad Company, petitioner herein, and presents with its petition for appeal herein this assignment of errors and says that in the record and proceedings in the above entitled cause and the decree made and entered against it therein on the 22nd day of April, 1932, there is error in the particulars hereinafter set forth.

The District Court for the Northern District of Illinois, Eastern Division, erred in making the decree and in dismissing the petition herein in the followng respects:

(1) It erred in finding that petitioner made no complaint with respect to the only affirmative part of the order made by the Interstate Commerce Commission on December 7, 1931.

(2) It erred in finding that the order of said Commission, made December 7, 1931, contains no requirements whatsoever in respect of the divisions of the so-called transit rates.

(3) It erred in finding that the said order of the Commission, made on December 7, 1931, contains no affirmative requirement with respect to the divisions of the so-called transit rates.

(4) It erred in finding that the order of said Commission, made on December 7, 1931, places no compulsion [fol. 172] upon petitioner with respect to the divisions of the so-called joint transit rates or with respect to the said rates or the through routes over which they apply.

(5) It erred in finding that the said order of the Commission, made on December 7, 1931, in so far as it related to the divisions of the so-called joint transit rates, was negative both in form and in substance.

(6) It erred in finding that it had no jurisdiction to issue an injunction enjoining, vacating, annulling and setting aside so much of the said order of the Interstate

Commerce Commission, made on December 7, 1931, approving and authorizing the application by the Railroad Defendants herein of the present divisions of the so-called joint transit or reshipping rates, and in finding that it had no jurisdiction to issue an injunction restraining the said Railroad Defendants herein from continuing to apply and enforce the said divisions of said rates.

(7) It erred in finding that the petition herein should be dismissed for want of jurisdiction.

(8) It erred in failing to find, as it should have done, that it had jurisdiction to issue the injunction prayed for herein.

(9) It erred in failing to find, as it should have done, that the evidence before the said Commission was insufficient to support its order of December 7, 1931, in so far as said order approved and authorized the application of the present divisions of the said joint transit or reshipping rates.

(10) It erred in failing to find, as it should have done, that the said order of the said Commission, made on December 7, 1931, in so far as said order relates to the present divisions of the said joint transit or reshipping rates, was an affirmative exercise by said Commission of the jurisdiction over divisions conferred upon it by the provisions of the Act to Regulate Commerce.

(11) It erred in failing to find, as it should have done, [fols. 173 & 174] that the said order of the said Commission, made on December 7, 1931, in so far as it relates to the divisions of the said joint transit or reshipping rates, authorizes and approves the application and enforcement of divisions which operate to confiscate the property of petitioner, in violation of its rights under the Fifth Amendment to the Constitution of the United States.

(12) It erred in failing to issue the injunction prayed for in the petition herein.

Wherefore petitioner prays that the said decree entered herein on the 22nd day of April, 1932, be reversed and that the said District Court of the United States for

the Northern District of Illinois, Eastern Division, be directed to enter a decree granting the petition of the petitioner, and that said order of the Interstate Commerce Commission, in so far as it is complained of in said petition, be declared void and perpetually set aside, suspended and annulled, and that your petitioner may have such other and further relief as may be appropriate.

Silas H. Strawn, Frank H. Towner, Solicitors for Petitioner.

[fols. 175 & 176] In United States District Court

[Title omitted]

Order Allowing Appeal—April 22, 1932

Upon the entering of the final decree in this cause came Silas H. Strawn and Frank H. Towner, solicitors and counsel for petitioner, and filed their assignment of errors and petition for appeal, and it is hereby

Ordered that an appeal by petitioner in the above entitled cause to the Supreme Court of the United States from the decree heretofore filed and entered herein on April 22nd 1931, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the Supreme Court of the United States, said appeal being hereby made returnable thirty (30) days from the date hereof.

It is further ordered that the bond on appeal be and the same is hereby fixed at the sum of One Thousand Dollars ($1,000.00).

Dated April 22nd 1932.

Evan A. Evans, United States Circuit Judge. Walter C. Lindley, Charles E. Woodward, United States District Judges.

O. K.

J. Stanley Payne, for Interstate Commerce Commission.

O. K.

Elmer B. Collins, for United States of America.

O. K.

J. L. Aber, L. P. Day, for Railroad Defendants.

[fols. 177-180] Bond on appeal for $1,000.00, approved and filed April 22, 1932, omitted in printing.

[fol. 181] In United States District Court

[Title omitted]

Notice of Lodgment—Filed May 10, 1932

To United States of America, Interstate Commerce Commission, and the Baltimore and Ohio Railroad Company, et al. (Railroad Defendants), defendants herein:

Please take notice that the petitioner (appellant) in the above cause, has lodged in the Clerk's office of the United States District Court for the Northern District of Illinois, Eastern Division, at Chicago, Illinois, for the examination of the parties hereto, the narrative statement of evidence to be included in the transcript of record on appeal to the Supreme Court of the United States from the final decree entered in the above proceeding on April 22, 1932.

Further please take notice that on the 10th day of May, 1932, at 10 o'clock A. M., at the court room of said United States District Court in Chicago, Illinois, appellant will move the court to enter an order approving said narrative statement of evidence and providing for the certification to the Supreme Court of the United States of the exhibits filed upon the trial of said cause in said District Court, said exhibits to be certified and forwarded by the Clerk of the District Court to the Supreme Court of the United States as [fols. 182 & 183] original exhibits, not as part of the transcript of record but separately therefrom, a copy of said order being served upon you herewith.

Silas H. Strawn, Frank H. Towner, Counsel for Petitioner.

Received a copy of the foregoing notice and order therein referred to this 10th day of May, 1932.

Elmer B. Collins, Special Assistant to the Attorney General, for United States of America. J. Stanley Payne, for Interstate Commerce Commission. J. L. Aber, Leo P. Day, Counsel for the Baltimore and Ohio Railroad Company et al., Railroad Defendants. Oscar E. Carlstrom, Attorney General of the State of Illinois.

[fol. 184] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPROVING STATEMENT OF EVIDENCE, ETC.—May 10, 1932

This cause coming on for hearing on the motion of petitioner (appellant) for an order approving the narrative statement of evidence filed herein and certifying original exhibits to the Supreme Court of the United States, and the court being fully advised in the premises,

It is ordered:

(1) That the narrative statement of evidence filed herein, and which, with the original exhibits offered in evidence and to be certified separately to the Supreme Court of the United States, is a true and complete statement of all the evidence introduced in this cause and comprises all the evidence offered and received on the trial hereof, be and it is hereby approved.

2. That the clerk of this court, in preparing the transcript of the record on the appeal herein to the Supreme Court of the United States shall certify to said court all exhibits and other documents which were attached to petitioner's Exhibit 1 introduced in evidence on the trial of this cause in this court, the said exhibits so attached to petitioner's Exhibit 1 being marked before the Interstate Commerce Commission as Exhibits 1 to 33, both inclusive; but shall not include the transcript of oral testimony included in said petitioner's Exhibit 1 for the reason that [fols. 185 & 186] said testimony has been reduced to narrative form and is being certified and forwarded in the transcript of record; that said exhibits shall be certified and forwarded by the Clerk of this court to the Supreme Court of the United States as original exhibits, not as part of the transcript of record but separately therefrom, and that any party hereto may refer to said original exhibits in their briefs and arguments with like effect as though they were printed as part of the record.

Evan A. Evans, Judge United States Circuit Court.
Walter C. Lindley, Charles E. Woodward, Judges of United States District Court.

May 10, 1932.

O. K.

Elmer B. Collins, for United States of America.

O. K.

J. Stanley Payne, for Interstate Commerce Comm.

O. K.

J. L. Aber, Leo P. Day, for Baltimore & Ohio Railroad Company et al., Railroad Defendants.

[fol. 187] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD—Filed May 10, 1932

It is hereby stipulated by and between the parties hereto, by their respective counsel, for the purpose of settling the record herein on appeal to the Supreme Court of the United States,

(1) That the narrative statement of evidence filed herein is a true and correct statement in narrative form of the proceedings had and of the testimony introduced on the trial of the above cause and includes a true and correct statement in narrative form of the oral testimony taken by the Interstate Commerce Commission in the proceedings before it known as its Docket No. 22487, William W. Wheelock and William G. Bierd, as Receivers, etc. v. The Akron, Canton & Youngstown Railway Company, et al., the entire record in said proceedings before said Commission having been introduced in evidence in this cause as Exhibit No. 1.

(2) That the narrative statement of evidence filed herein, which includes a narrative statement of the oral testimony taken by the Interstate Commerce Commission in the proceedings before it known as its Docket 22487, William W. Wheelock and William G. Bierd, as Receivers, etc. v. The Akron, Canton & Youngstown Railway Company, et al., [fol. 188] sets forth in condensed form all oral testimony offered on the trial hereof which is essential to the decision of the questions presented by the appeal.

(3) That the clerk of this court, in preparing the transcript of the record on appeal in the above entitled cause

to the Supreme Court of the United States, shall certify to said court the original exhibits and all other documents which were attached to petitioner's Exhibit 1 introduced in evidence on the trial of said cause, the said exhibits so attached to petitioner's Exhibit 1 being marked Exhibits 1 to 33, both inclusive; but shall not include the transcript of oral testimony included in said petitioner's Exhibit 1 for the reason that said testimony has been reduced to narrative form and is being certified and forwarded in the transcript of the record; that said exhibits and other documents so attached to petitioner's Exhibit 1 shall be certified and forwarded by the clerk of this court to the Supreme Court of the United States as original exhibits, not as part of the transcript of record but separately therefrom, and that any party hereto may refer to said original exhibits and other documents in their briefs and arguments with like effect as though they were printed as part of the record.

Elmer B. Collins, Special Asst. to the Atty. General, for United States of America. J. Stanley Payne, for Interstate Commerce Commission. J. L. Aber, Leo P. Day, for the Baltimore and Ohio Railroad Company et al., Railroad Defendants. Silas H. Strawn, Frank H. Towner, for Petitioner (Appellant).

[fol. 189] In United States District Court

[Title omitted]

Præcipe for Transcript of Record—Filed May 10, 1932

To the Honorable Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division:

Please prepare a transcript of record in the above entitled cause on appeal to the Supreme Court of the United States, including therein the following:

(1) Bill of complaint or petition, which should include Appendices A, B and C thereto.

(2) Answer of the United States of America.

(3) Answer of the Interstate Commerce Commission.

(4) Answer of The Baltimore and Ohio Railroad Company, et al., the Railroad Defendants.

(5) Order setting case for hearing.

(6) Narrative statement of evidence.

(7) Findings of fact and conclusions of law filed by the court.

(8) Opinion of the court.

(9) Final decree.

(10) Notice of application for order allowing appeal.

(11) Petition for appeal.

(12) Assignment of errors.

(13) Order allowing appeal.

[fol. 190] (14) Citation on appeal.

(15) Bond on appeal.

(16) Notice of lodgement in Clerk's office of narrative statement of evidence to be included in the transcript of record on appeal and of application for an order approving said narrative statement of evidence and providing for the certification of original exhibits to the Supreme Court.

(17) Order approving the narrative statement of evidence and providing for the certification to the Supreme Court of original exhibits.

(18) Stipulation with respect to narrative statement of evidence and certification of original exhibits to the Supreme Court.

(19) Præcipe for transcript of record.

Silas H. Strawn, Frank H. Towner, Counsel for Petitioner (Appellant).

Service of the foregoing præcipe and receipt of a copy thereof are hereby admitted and acknowledged upon the dates respectively set opposite our names.

United States of America, by Elmer B. Collins, Special Asst. to the Attorney General, May 10th, 1932. Interstate Commerce Commission, by J. Stanley Payne, Assistant Chief Counsel, May 7, 1932. The Baltimore and Ohio Railroad Company et al., Railroad Defendants, by J. L. Aber, Leo P. Day, May 10th, 1932. State of Illinois, by Oscar E. Carlstrom, Attorney General, May 10th, 1932.

[File endorsement omitted.]

[fol. 191] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 192-198] Citation, in usual form, showing service on Elmer B. Collins et al., filed April 27, 1932, omitted in printing.

[fol. 199] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed May 16, 1932

Now comes appellant in the above entitled cause, by Silas H. Strawn and Frank H. Towner, its solicitors, and files this statement of the points upon which appellant intends to rely and of the parts of the record which it thinks necessary for the consideration thereof, together with proof of service of the same, upon appellees.

Statement of Points to be Relied Upon by Appellant

(1) The District Court erred in finding that appellant made no complaint with respect to the only affirmative part of the order made by the Interstate Commerce Commission on December 7, 1931.

(2) The District Court erred in finding that the order of the Interstate Commerce Commission, made on December 7, 1931, contains no requirements whatsoever in respect of [fol. 200] the divisions of the so-called transit rates.

(3) The District Court erred in finding that the order of the Interstate Commerce Commission, made on December 7, 1931, places no compulsion upon appellant with respect to the divisions of the so-called joint transit rates or with respect to said rates or the through routes over which they apply.

(4) The District Court erred in finding that the order of the Interstate Commerce Commission, made on December 7, 1931, in so far as it related to the divisions of the so-called joint transit rates, was negative both in form and in substance.

(5) The District Court erred in finding that it had no jurisdiction to issue an injunction enjoining, vacating, annulling and setting aside so much of the order of the Interstate Commerce Commission, made on December 7, 1931, approving and authorizing the application by the Railroad Defendants of the present divisions of the so-called joint transit or reshipping rates; in finding that it had no jurisdiction to issue an injunction restraining the said Railroad Defendants from continuing to apply and enforce the said divisions of said rates, and in finding that the petition herein should be dismissed for want of jurisdiction.

(6) The District Court erred in failing to enjoin, vacate, annul and set aside so much of the order of the Interstate Commerce Commission, made on December 7, 1931, as approves and authorizes the application by the Railroad Defendants of the present divisions of the so-called joint transit or reshipping rates, and in failing to issue an injunction restraining said Railroad Defendants from continuing to apply and enforce the said divisions of said rates, and in dismissing the petition of appellant, and in denying its application for an injunction.

(7) The District Court erred in failing to find, as it should have done, that the order of the Interstate Commerce Commission, made on December 7, 1931, in so far as [fol. 201] said order relates to the present divisions of said joint transit or reshipping rates, was unreasonable, arbitrary and void; in failing to find, as it should have done, that said part of said order was not supported by any evidence introduced in the proceedings before said Commission; in failing to find, as it should have done, that the evidence introduced in the proceedings before said Commission did not justify the conclusions and order of said Commission with respect to the divisions of said rates; and in failing to find, as it should have done, that said order, made on December 7, 1931, in so far as it relates to the divisions of said rates, authorizes and approves the application and enforcement of divisions which operate to confiscate the property of appellant, in violation of its rights under the Fifth Amendment to the Constitution of the United States.

Designation of Parts of Record to be Printed

Appellant hereby designates for printing the entire transcript of the record, which it thinks necessary for consider-

ation in determining the appeal herein, but not including the original exhibits which have been certified to this court separately and not as part of said transcript of record.

Silas H. Strawn, Frank H. Towner, Solicitors for Appellant.

[fols. 202 & 203] Service of the foregoing statement of points to be relied upon by appellant upon the appeal herein, and designation of parts of the record to be printed, and receipt of a copy hereof, are hereby admitted and acknowledged by the following:

United States of America, by Thomas D. Thacher, Solicitor General, (J.) this 16th day of May, 1932. Interstate Commerce Commission, by J. Stanley Payne, this 16th day of May, 1932. The Baltimore and Ohio Railroad Company et al., Railroad Defendants, by J. L. Aber, L. P. Day, this 14th day of May, 1932.

[fol. 204] [File endorsement omitted.]

Endorsed on cover: File No. 36,770. N. Illinois D. C. U. S. Term No. 81. The Alton Railroad Company, appellant, vs. The United States of America, Interstate Commerce Commission, Baltimore and Ohio Railroad Company, et al. Filed May 16, 1932. File No. 36,770.

FILE COPY

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 881

THE ALTON RAILROAD COMPANY, A CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

MOTION BY APPELLANT TO ADVANCE.

SILAS H. STRAWN,
FRANK H. TOWNER,
Solicitors for Appellant.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. .....

THE ALTON RAILROAD COMPANY, A CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

MOTION BY APPELLANT TO ADVANCE.

MAY IT PLEASE THE COURT:

Now comes appellant in the above entitled cause and moves that said cause be advanced for early hearing, and in support of its motion makes the following statement of the matter involved and of the reasons supporting the motion.

The question involved in the case is the validity of part of an order entered by the Interstate Commerce Commission in a proceeding before it and designated as its Docket No. 22487, *William W. Wheelock and William G. Bierd, as Receivers, etc., of The Chicago and Alton Railroad Company* v. *Akron, Canton & Youngstown Railway Company, et al.* The complainants in the case

before the Commission were the predecessors in interest of appellant, which, prior to the institution of this suit in the District Court succeeded to the rights of those complainants, being the assignee of the purchaser at judicial sale of all the railways and properties of The Chicago and Alton Railroad Company.

The complaint of the predecessors of appellant in the proceeding before the Commission (Appendix A to petition, Rec. 3) was that the existing divisions of certain joint through rates were unreasonable and otherwise unlawful. The joint through rates in question had been published for many years by agreement between the predecessors of appellant and the eastern carriers which were defendants before the Commission, and are now published by agreement between appellant and the same eastern carriers. They applied and now apply on traffic moving from Peoria and/or Pekin, Illinois, to destinations in Eastern Trunk Line territory. Under them, appellant hauls the traffic to Dwight, Joliet or Chicago, Illinois, and there delivers it to the eastern carriers for transportation to destination.

Most of the traffic moving on these rates moves into Peoria or Pekin from points west thereof. If it is reshipped under the joint rates from Peoria or Pekin to the east within 12 months after its delivery at either point, the applicable rates are called "reshipping" or "proportional" rates and vary in amount, depending upon the territory from which the shipment to Peoria to Pekin was made. If not reshipped within 12 months, the applicable rates are called "local" rates. Both kinds of rates are joint rates, and differ only in amount. On July 1, 1928, the eastern lines, without the consent of the predecessors of appellant and without any order of any commission or other body having jurisdiction, changed the divisions of the joint rates from Peoria and

Pekin, reducing the proportions allowed to the predecessors of appellant to nothing in many cases and to a maximum of 2 cents per hundred pounds in other cases. The complaint was then filed with the Commission.

The final order of the Commission in the case, made on December 7, 1931 (Appendix C to petition, Rec. 3), found that the existing divisions of the "reshipping" rates, and which had been attacked in the complaint, had not been shown to be unjust, unreasonable or otherwise unlawful. Four of the Commissioners dissented from this conclusion.

Appellant then brought this suit under the provisions of the Urgent Deficiencies Act of October 22, 1913 (38 Stat. L. 219-220, U. S. C. A., Title 28, Sections 41 *et seq.*) to enjoin, set aside, annul and suspend so much of the order of the Commission as approved and authorized the application of said divisions in the future. Thirty eastern railroads who joined in the publication of the joint rates in issue were also named as defendants and an injunction was also asked restraining them from enforcing and applying said divisions against appellant.

In its petition filed in the lower court it was alleged that the order made by the Commission, in so far as it approved and authorized said divisions, was unreasonable, arbitrary, unlawful and void; that it operated to permit and authorize a confiscation of appellant's property, in violation of its rights under the Fifth Amendment to the Constitution of the United States; that there was no evidence in the record of the proceedings before the Commision which justified the conclusion reached by it; that in so far as the order approved and authorized the application of those divisions, it should be enjoined, annulled, vacated and set aside; and that the defendant railroads should be enjoined from applying and enforcing those divisions against appellant. The order of

December 7, 1931, is attached to said petition as Appendix C (Rec. 3). The District Court entered a decree on April 22, 1931 (Rec. 164) dismissing the petition on the ground that the order of the Commission, in so far as it was attacked, was negative in form and in substance, and that the court was without jurisdiction to issue the injunction prayed for. Appellant has taken this appeal from that decree to this court. The cause was docketed in this court on May 16, 1932, and the jurisdictional statement for appellant was filed on the same date. The record in this court has not yet been printed and all page references are to the pages of the original record.

The reasons why said cause should be advanced for hearing are as follows:

The Urgent Deficiencies Act of October 22, 1913 (38 Stat. L., 219-220) provides that the final judgment or decree of the District Court in such a case as this may be reviewed by this court upon appeal, and that appeals in such cases shall have priority in hearing and determination in this court over all other causes except criminal causes.

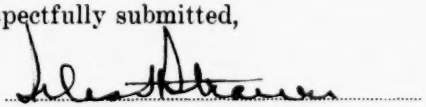
The approval by a majority of the Commission of those divisions of the "reshipping" rates which had been established by the eastern carriers on July 1, 1928, permits and authorizes those carriers, appellees herein, to apply those divisions in the future. They are now being applied and enforced by those carriers against appellant in the division of all revenue accruing on traffic moving under the "reshipping" rates. Appellant is compelled to handle traffic under those rates so long as they are in effect, and is continually handling it. The application by the eastern carriers, appellees herein, of the divisions established by them on July 1, 1928, and approved and authorized by the Commission in its order of December 7, 1931, therefore results in appellant being

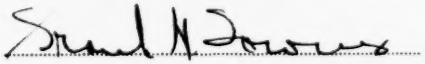
compelled to continually handle traffic either for no compensation whatever, or for a compensation which does not in any case pay the cost of appellant's operation.

The only manner in which appellant can avoid this continual loss is by canceling the joint rates in issue and retiring from the business. Such action would, however, require the approval of the Commission which might not be granted. Moreover, appellant desires to continue to handle the traffic under a fair division of the rates applicable thereto, and denies in this suit the right of the Commission to compel it to retire from the traffic under the record made before the Commission.

WHEREFORE, appellant moves that said cause be set down for argument at as early a date as is practicable.

Respectfully submitted,





Solicitors for Appellant.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 1136 81

THE ALTON RAILROAD COMPANY, A CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

STATEMENT BY APPELLANT OF BASIS ON WHICH COURT HAS JURISDICTION TO REVIEW DECREE ON APPEAL.

SILAS H. STRAWN,
FRANK H. TOWNER,
Solicitors for Appellant.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. .....

THE ALTON RAILROAD COMPANY, A CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

STATEMENT BY APPELLANT OF BASIS ON WHICH COURT HAS JURISDICTION TO REVIEW DECREE ON APPEAL.

MAY IT PLEASE THE COURT:

In this suit, appellant sought to enjoin, annul, suspend and set aside part of an order of the Interstate Commerce Commission, made on December 7, 1931, in a proceeding before the Commission known as its Docket No. 22487, *William W. Wheelock and William G. Bierd, as Receivers, etc. of The Chicago and Alton Railroad Company* v. *Akron, Canton & Youngstown Railway Company, et al.*, and to enjoin thirty eastern railroads from applying and enforcing against appellant, certain divisions of certain joint through rates, those divisions having been approved by the Commission in the order. The

suit was heard in the District Court by a three-judge court, convened pursuant to the Act of Congress of October 22, 1913 (38 Stat. L. 220, Title 28, U. S. C. A. 47). On April 22, 1932, a final decree was made by the court dismissing the petition of appellant for want of jurisdiction. This appeal is prosecuted from that decree.

(1) The jurisdiction of this court to review said decree on appeal is sustained by the following statutory provisions. The Urgent Deficiencies Act of October 22, 1913 (38 Stat. L. 219-220) confers upon the District Courts of the United States the jurisdiction theretofore vested in the Commerce Court, including jurisdiction over all suits brought to enjoin, suspend, annul, or set aside any order of the Interstate Commerce Commission. The same act provides, with reference to an appeal from the final decree of a District Court in such action, as follows:

> "A final judgment or decree of the District Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases." (38 Stat. L. 220; Title 28, U. S. C. A., Sec. 47.)

By the Act of February 13, 1925, entitled "An Act to amend the Judicial Code and to further define the jurisdiction of the Circuit Courts of Appeals and of the Supreme Court, and for Other Purposes," Section 238 of the Judicial Code was amended to provide:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a District Court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:
>
> * * * * *
>
> (4) So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes,' ap-

proved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend or set aside orders of the Interstate Commerce Commission other than for the payment of money." (43 Stat. L., 938; Judicial Code, Sec. 238; Title 28, U. S. C. A., Sec. 345.)

(2) The decree sought to be reviewed upon this appeal was made and entered on April 22, 1932 (Rec. 164).* The petition for appeal herein (Rec. 169), together with an assignment of errors (Rec. 171) was presented, and the order allowing the appeal was entered, on April 22, 1932 (Rec. 175). The appeal bond was approved and filed on April 22, 1932 (Rec. 177). The citation was issued on April 22, 1932, and after due service, was filed on April 27, 1932 (Rec. 192). The cause was docketed in this court on May 16, 1932.

(3) This suit was instituted by appellant for the purpose of enjoining, annulling, suspending and setting aside an order of the Interstate Commerce Commission, made on December 7, 1931, in a proceeding pending before the Commission and known as its Docket No. 22487, *William W. Wheelock and William G. Bierd, Receivers, etc. of The Chicago and Alton Railroad Company* v. *Akron, Canton & Youngstown Railway Company, et al.*, in so far as said order approved and authorized the application and enforcement of certain divisions of certain joint through rates from Peoria and Pekin, Illinois, to destinations in Eastern Trunk Line territory. Appellant also prayed an injunction against thirty eastern railroads, appellees herein, to restrain them from applying and enforcing against it the divisions approved by the Commission. Appellant is the assignee of the purchasers, at judicial sale, of the railways and property of The Chicago and Alton Railroad Company, and has succeeded to the rights of the receivers of that company.

* All page references are to the pages of the record filed in this court and which has not yet been printed.

The joint through rates involved were published for many years by agreement between the predecessors in interest of appellant, and the carriers operating east of Dwight, Joliet and Chicago, Illinois, and are now published by agreement between appellant and the same eastern carriers. Appellant's service under these rates consists of hauling the traffic from Peoria and/or Pekin to Dwight, Joliet or Chicago. Most of the traffic moving on these rates moves into Peoria or Pekin from points west thereof. If it is reshipped under the joint rates from Peoria or Pekin to the east within twelve months after its delivery at either point, the applicable rates are called "reshipping" or "proportional" rates, and vary in amount, depending upon the territory from which the shipment to Peoria or Pekin was made. If not shipped within twelve months, the applicable rates are called "local" rates. Both kinds of rates are joint rates, and differ only in amount.

Prior to July 1, 1928, the divisions of these rates as between the predecessors of appellant and the eastern lines were presumably satisfactory. On that date, the eastern lines, without the consent of the predecessors of appellant and without any order of any commission or other body having jurisdiction, arbitrarily changed the divisions, reducing the proportions allowed to the predecessors of appellant to nothing in many cases and to a maximum of 2 cents per hundred pounds in all other cases. The predecessors of appellant thereupon filed a complaint with the Commission, naming as defendants all eastern lines which were parties to the joint rates, and alleging that the divisions established by them were unreasonable and otherwise unlawful (Appendix "A" to petition, Rec. 3).

After hearing, Division 5 of the Commission entered an order on November 28, 1930, granting the prayer of

the complaint and requiring the eastern lines to establish certain divisions found by the Commission to be proper (Appendix "B" to petition, Rec. 3). Before this order became effective, the defendants in the proceedings before the Commission petitioned for a rehearing and a postponement of the order. This petition was granted and a rehearing held. Thereafter, on December 7, 1931, the order herein attacked was made by the full Commission, four Commissioners dissenting (Appendix "C" to petition, Rec. 3). In this order the previous order of Division 5, with respect to the divisions of the so-called "local" rates was affirmed. The order of Division 5 with respect to the so-called "reshipping rates" was reversed, and it was held by a majority of the Commission that the assailed divisions of those "reshipping" rates had not been shown to be unjust, unreasonable or otherwise unlawful. The joint "reshipping" rates, however, remained in effect and are still in effect. The result has been that appellant is required to continue the transportation of commodities upon those rates, although it receives nothing on many shipments and on all other shipments amounts which do not pay the cost of operation.

The petition filed in the District Court (Rec. 3) alleged that the order made by the Commission on December 7, 1931, in so far as it approved and authorized the existing divisions of the joint "reshipping" rates, was unreasonable, arbitrary, unlawful and void; that it operated to permit and authorize a confiscation of appellant's property, in violation of its rights under the Fifth Amendment to the Constitution of the United States; that there was no evidence in the record of the proceedings before the Commission which justified the conclusion reached; that in so far as the order approved and authorized the application of those divisions, it should be enjoined, annulled, vacated and set aside, and that

the defendant railroads should be enjoined from applying and enforcing those divisions against appellant.

After a hearing in the District Court, a decree was entered on April 22, 1931 (Rec. 164), dismissing the petition, the holding of the District Court being that the order of the Commission, made on December 7, 1931, in so far as it related to the divisions of the so-called "reshipping" rates, was negative both in form and in substance, and that the court was therefore without jurisdiction to issue the injunction prayed for. The decree of the lower court constituted a final judgment within the meaning of the Act of Congress of October 22, 1913 (38 Stat. L. 220), and pursuant to the provisions thereof, and of the Act of Congress of February 13, 1925 (43 Stat. L. 938), a direct review of this final judgment and decree may be had in this court.

(4) Cases which sustain the jurisdiction of this court to review said decree are as follows:

Virginian Railway Company v. *United States,* 272 U. S. 658.

United States v. *New York Central Railroad Co.* 263 U. S. 603.

Dayton-Goose Creek Ry. Co. v. *United States,* 263 U. S. 456.

Stafford v. *Wallace,* 258 U. S. 495, 512.

Louisville & Nashville Railroad Co. v. *United States,* 238 U. S. 1.

United States v. *The Baltimore & Ohio R. R. Co.* 225 U. S. 306.

Respectfully submitted,

SILAS H. STRAWN,
FRANK H. TOWNER,
Solicitors for Appellant.

the defendant railroads should be enjoined from applying and enforcing those divisions against appellant.

After a hearing in the District Court, a decree was entered on April 22, 1931 (Rec. 164), dismissing the petition, the holding of the District Court being that the order of the Commission, made on December 7, 1931, in so far as it related to the divisions of the so-called "reshipping" rates, was negative both in form and in substance, and that the court was therefore without jurisdiction to issue the injunction prayed for. The decree of the lower court constituted a final judgment within the meaning of the Act of Congress of October 22, 1913 (38 Stat. L. 220), and pursuant to the provisions thereof, and of the Act of Congress of February 13, 1925 (43 Stat. L. 938), a direct review of this final judgment and decree may be had in this court.

(4) Cases which sustain the jurisdiction of this court to review said decree are as follows:

Virginian Railway Company v. *United States,* 272 U. S. 658.

United States v. *New York Central Railroad Co.* 263 U. S. 603.

Dayton-Goose Creek Ry. Co. v. *United States,* 263 U. S. 456.

Stafford v. *Wallace,* 258 U. S. 495, 512.

Louisville & Nashville Railroad Co. v. *United States,* 238 U. S. 1.

United States v. *The Baltimore & Ohio R. R. Co.* 225 U. S. 306.

Respectfully submitted,

SILAS H. STRAWN,
FRANK H. TOWNER,
Solicitors for Appellant.

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CHARLES ELMORE
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No. 81

THE ALTON RAILROAD COMPANY, A CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

BRIEF ON BEHALF OF APPELLANT.

SILAS H. STRAWN,
FRANK H. TOWNER,
Solicitors for Appellant.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No. 81.

THE ALTON RAILROAD COMPANY, A CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

BRIEF ON BEHALF OF APPELLANT.

MAY IT PLEASE THE COURT:

This case comes to this court on appeal from an order of the District Court for the Northern District of Illinois, Eastern Division, dismissing the petition of appellant for lack of jurisdiction. The action is one by appellant to set aside that part of an order made by the Interstate Commerce Commission (hereinafter called the "Commission"), in which the Commission refused to require a change in the divisions of certain joint rates. The defendants are The United States of America, the Commission and thirty eastern railroads (hereinafter called the "Railroad Defendants") which joined with appellant in the publication of the joint rates involved.

1. Reference to Official Report of Opinion of Lower Court and to Reports and Orders of the Interstate Commerce Commission.

The opinion of the lower court in this case is officially reported at 58 Fed. (2d) 399, and appears in the printed record at pages 177 to 184, inclusive. The lower court also made twelve findings of fact and stated three conclusions of law which appear at pages 173 to 177 of the printed record.

Two reports were made by the Commission in the proceedings before it, the case being entitled "William W. Wheelock and William G. Bierd, Receivers, etc. *vs.* Akron, Canton & Youngstown R. Co., *et al.*, Docket No. 22487." The first one, dated November 28, 1930, is reported at 169 I. C. C. 594, and was accompanied by an order, not officially reported, which granted the relief sought. This report and order appears at pages 22 to 40, inclusive, of the printed record. The second report of the Commission is reported at 179 I. C. C. 517, and was also accompanied by an order which is not officially reported. This report and order appears at pages 41 to 56, inclusive, of the printed record. The order itself, part of which is attacked herein, appears at pages 50 to 56, inclusive, of the printed record.

2. Statement of the Case.

The facts appearing in the record made before the Commission are reviewed in the two reports of the Commission and may be briefly stated. By tariff publication, the grain-producing territory west of the Peoria-Pekin district and Chicago, Illinois, is divided into four groups known as Trans-Mississippi River, Northern Iowa, Illinois-Iowa, and Northwestern territories (R. 87). These groups are outlined on Exhibit 14 before the Commis-

sion (R. 90). Shipments of grain, grain products and grain by-products move from these territories to Peoria-Pekin or Chicago upon either local or proportional rates, published by the carriers operating west of Peoria-Pekin and Chicago, and which collect and retain all the revenue accruing thereunder (R. 93, 104, 105).

The transportation of shipments consigned to Peoria-Pekin is completed by the unloading of the cars and the payment of the charges. The commodities go into elevators and may be sold and resold; may be used in Peoria; may be manufactured into other commodities and thereafter be used in Peoria or shipped elsewhere. The identity of the shipments is not preserved and a subsequent outbound shipment of grain or its products may not be the same shipment that moved inbound (R. 93, 94).

When an outbound shipment of grain, grain products or grain by-products is made from Peoria-Pekin to destinations east of Buffalo, New York, the shipper can secure the application of a "reshipping" or "proportional" rate if he surrenders billing showing that within the preceding twelve months, an equivalent weight of grain, its products or by-products, moved inbound to Peoria-Pekin from one of the territories west thereof (R. 94). The amounts of the outbound "reshipping" rates vary, dependent upon the territory from which the inbound shipment, covered by the surrendered billing, moved. Thus, if that billing covered a grain shipment from Trans-Mississippi River territory to Peoria-Pekin, the outbound grain "reshipping" rate would be 32 cents per hundred pounds. If it covered a grain shipment from Northern Iowa territory to Peoria-Pekin, the outbound grain "reshipping" rate would be 30.5 cents per hundred pounds. If it covered a grain shipment from Northwestern territory to Peoria-Pekin, the outbound

grain "reshipping" rate would be 30 cents per hundred pounds (R. 102-103).

If an outbound shipment of grain, its products or by-products, from Peoria-Pekin to eastern destinations is not accompanied by the surrender of billing showing an inbound shipment to Peoria-Pekin within the preceding twelve months, the applicable outbound rate is known as a "local" rate, and is uniformly higher than any of the "reshipping" rates (R. 88). The names of the two kinds of rates have no significance. The same transportation service is performed east of Peoria-Pekin under both the "local" and "reshipping" rates, and they differ only in amount (R. 94). Only their application is determined by the surrender of inbound billing.

Both kinds of rates are joint rates, published by agreement between appellant and its predecessors and the Railroad Defendants, and have been in effect for many years (R. 120). They have always been and are now published and filed with the Commission as required by Section 6 of the Act to Regulate Commerce (U. S. C. A., Title 49, Sec. 1 to 15a, p. 281), being shown in Exhibit 1 before the Commission (R. 82). The service performed by appellant and its predecessors under these joint rates from Peoria-Pekin to eastern destinations consists of originating the shipments at Peoria-Pekin, hauling them to Dwight, Joliet or Chicago, Illinois, and there delivering them to one of the Railroad Defendants for further transportation (See Ex. 15 before Commission; certified to this court, R. 90).

Another circumstance should be mentioned since it was principally relied on by the defendants in the proceedings before the Commission. The through rates, composed of the local or proportional rates to Peoria-Pekin or Chicago plus the "reshipping" rates to the east, from any point in the territories west of Chicago and Peoria-

Pekin to any point in eastern territory are equalized via both Peoria-Pekin and Chicago (R. 119, 120). This parity of rates is maintained for competitive reasons.

These through rates, however, are not joint rates, the separate rates to and from the junctions varying in amount. In some cases, the rates to Peoria-Pekin and Chicago are the same, and in these cases, the "reshipping" rates to the east are the same from both points. In some cases, the rates to Chicago are 1/2 cent per hundred pounds higher than the rates to Peoria-Pekin, and in these cases the "reshipping" rates from Peoria-Pekin are 1/2 cent per hundred pounds higher than the "reshipping" rates from Chicago. In other cases, the rates to Chicago are 2 cents per hundred pounds higher than the rates to Peoria-Pekin, and in these cases the "reshipping" rates from Peoria-Pekin are 2 cents per hundred pounds higher than the "reshipping" rates from Chicago.

Thus, for example, a shipment from Goodland, Kansas, to New York, via Chicago, would move on a through rate of 65 cents, made up of a rate of 34.5 cents to Chicago and a "reshipping" rate from Chicago of 30.5 cents. A shipment from Goodland moving to New York via Peoria, would also move on a through rate of 65 cents, made up of a rate of 32.5 cents to Peoria and a "reshipping" rate of 32.5 cents from Peoria to New York. The essential fact, however, is that the "local" and "reshipping" rates from Peoria-Pekin to the east are joint rates, published by appellant and the Railroad Defendants.

Until July 1, 1928, the divisions of these joint "local" and "reshipping" rates from Peoria-Pekin to eastern destinations, as between appellant and its predecessors and the Railroad Defendants herein, were agreed upon and were presumably satisfactory. On July 1, 1928, the

Railroad Defendants, over the objection and protest of the Receivers of The Chicago and Alton Railroad Company, predecessors of appellant (R. 86), established new divisions of the joint "reshipping" rates, reducing the proportion allowed the Receivers to nothing in many cases and to a maximum of 2 cents per hundred pounds in other cases.

This reduction was accomplished by the statement of the Railroad Defendants, that on traffic from Peoria-Pekin, moving under the joint "reshipping" rates, they would take the amount of their "reshipping" rate applying on similar traffic from Chicago to the same eastern destinations (R. 96-98). The Railroad Defendants also published new division sheets, effective July 1, 1928, and February 1, 1929 (Ex. 4 and 5 before Commission, R. 85) putting the new divisions into effect. Neither appellant nor its predecessors, the Receivers, were parties to these division sheets or consented to their issuance, nor were they authorized by any decision of the Commission or of any court (R. 86).

In many cases, the "reshipping" rate from Chicago was the same as that from Peoria-Pekin, which left the Receivers nothing for their service. In no case was the "reshipping" rate from Chicago more than 2 cents per hundred pounds less than the corresponding rate from Peoria-Pekin, so that the maximum earnings of the Receivers on any shipment amounted to 2 cents per hundred pounds. Exhibit 15 before the Commission shows that the earnings thus left to the Receivers were in most cases insufficient to pay even their switching absorptions on the traffic, to say nothing of other costs of transportation (R. 90-92). The Railroad Defendants were able to enforce these divisions upon the Receivers because all of the traffic moves eastbound from Peoria-Pekin and the freight charges are collected by them and other eastern lines.

After vainly endeavoring to secure a revision of the divisions thus established by the Railroad Defendants (R. 96-99), the Receivers of The Chicago and Alton Railroad Company filed with the Commission, on June 21, 1929 (R. 23), a petition alleging that those divisions were unlawful, in violation of Paragraph 4 of Section 1 of the Act to Regulate Commerce (U. S. C. A., Title 49, Sec. 1 to 15a, p. 52) and Section 208 (b), Transportation Act, 1920 (U. S. C. A., Title 49, Sec. 16 to end, p. 382), and asking that the Commission fix the proper divisions of the joint rates in question. This petition appears at pages 13 to 22 of the printed record, and only put in issue the propriety of the divisions between the Receivers and the Railroad Defendants of the joint "local" and "reshipping" rates applying from Peoria and Pekin to eastern destinations.

After hearing, Division 5 of the Commission issued the first report and order (R. 22-40). In this report, the contentions of the Receivers were upheld and the order required that proper divisions of the joint rates involved be made effective on or before March 10, 1931. This report, together with the dissenting opinion of Commissioner Porter (R. 33, *et seq.*), contains not only a full statement of the facts upon which Division 5 based its conclusion, but also those facts relied upon by the Railroad Defendants in defense of the divisions which had been arbitrarily established by them. Before the order thus entered became effective, the Railroad Defendants filed with the Commission a petition for rehearing and postponement of the order, which petition was granted and a rehearing had (R. 152, 153). During the interim between the first and second hearings, an effort was made by the Railroad Defendants to cancel some of the joint "reshipping" rates from Peoria-Pekin to the east. The Commission suspended the cancelling tariff upon

protest of some of the grain interests, and when the matter was called for hearing, the cancelling tariff was voluntarily withdrawn (R. 167).

Upon the submission of the case on rehearing, a majority of the entire Commission issued a second report (R. 41, *et seq.*) and order (R. 50 *et seq.*). In this second report and order, the previous action of Division 5 in requiring a revision of the divisions of the joint "local" rates was upheld and the eastern lines, including the Railroad Defendants, were required to establish the divisions prescribed by the Commission on or before January 16, 1932. That part of the order has been complied with and is not here in isuse. With respect to the divisions of the joint "reshipping" rates, however, a majority of the entire Commission reversed the action of Division 5, saying (R. 48):

> "We find that the assailed divisions of the reshipping or proportional rates have not been shown to be unjust, unreasonable, or otherwise unlawful as alleged, and the finding in the original report in that respect is reversed."

So far as may be judged from the language of the second report, this conclusion was reached after a consideration of transit at Peoria-Pekin and the alleged connection between the inbound and outbound movements of the traffic involved; because of the alleged circuity of the route from some of the western originating territory, via Peoria, to eastern destinations, and because an increase in the Receivers' divisions would have reduced the earnings of the Railroad Defendants to amounts less than their "reshipping" rates from Chicago.

By the order which accompanied this report, the original report and order of Division 5 and the report on rehearing are made a part of the order (R. 55); the original order of Division 5 is vacated; and there is a recital of the finding that (R. 56)

"the present divisions of joint reshipping or propor-

> tional rates on grain, grain products and grain by-products, in carloads, from Peoria and Pekin over the lines of complainants to Chicago, Joliet or Dwight, destined to points in eastern trunk line and New England territories east of Buffalo, are not unjust, unreasonable, or otherwise unlawful as alleged by complainants."

This disposition of the case by the Commission had the result of leaving in effect those divisions previously established by the Railroad Defendants over the objection of the Receivers, and of leaving the Receivers in the position of being required to perform a transportation service under joint rates out of which they received from nothing to a maximum of 2 cents per hundred pounds; amounts less than the cost of service. The action of the Commission in making the second report and entering the second order was not unanimous. Commissioners Eastman, Brainerd, Farrell and Lewis dissented on the ground that the divisions of the "reshipping" rates thus approved, were not just, reasonable and equitable, but on the contrary, were unreasonable and unjust and operated to confiscate the property of the Receivers (R. 48-50).

Subsequent to the second report of the Commission, the property formerly operated by the Receivers of The Chicago and Alton Railroad Company was acquired at judicial sale by appellant (175 I. C. C. 301), and appellant succeeded to the rights of the Receivers (R. 173).

3. Proceedings in the Lower Court.

The petition herein was filed on January 16, 1932, the suit being started pursuant to the provisions of the Urgent Deficiency Appropriations Act of October 22, 1913 (U. S. C. A., Title 28, Sec. 170, pp. 652, 653, 656). The petition (R. 1-12), after setting out the facts, alleges that the final order of the Commission with respect to the

divisions of the "reshipping" rates from Peoria-Pekin, established by the Railroad Defendants, constitutes an approval of those divisions and authorizes their application by the Railroad Defendants in the future (R. 7); that the effect of this order is to require appellant to engage in interstate transportation for a return which confiscates its property and that this result is not justified by any evidence before the Commission and is unreasonable, arbitrary, unlawful, and violates appellant's constitutional rights (R. 7-8); that if the present divisions of the "reshipping" rates, allowed to appellant by the Railroad Defendants, were approved in an effort to force appellant to discontinue its participation in the handling of traffic thereunder, that part of the order is void because that was not an issue presented to the Commission for adjudication and there was no evidence in the record with respect to it (R. 8).

It was further alleged (R. 9) that the divisions of the "reshipping" rates established by the Railroad Defendants, were in violation of Paragraphs 208 (b) of the Transportation Act, 1920; that they operated to confiscate the property of appellant and that the only authority for their enforcement against appellant was the Commission's order of December 7, 1931; that appellant had a lawful right to handle traffic under the "reshipping" rates from Peoria-Pekin, but was unable to do so without having its property confiscated by an application of the divisions approved by the Commission (R. 10).

All defendants filed answers (R. 56 *et seq.*, 63 *et seq.*, 73 *et seq.*), generally alleging the validity of the Commission's order with respect to the divisions of the "reshipping" rates and further moving to dismiss appellant's petition on the ground that the Commission's order, in so far as it dealt with those divisions, was negative in form and substance; was not an order within the meaning of the Commerce Court Act (36 Stat. 539) or

the Urgent Deficiencies Act (38 Stat. 219); and that the lower court was without jurisdiction to issue the injunction prayed for.

Upon the hearing in the lower court, the entire record made before the Commission in its Docket 22487 was introduced in evidence as Exhibit 1 (R. 80). After final hearing, the lower court dismissed appellant's petition (R. 184, 185) for want of jurisdiction, holding (R. 184) that since the order attacked, in so far as it is complained of, did not command appellant to do or refrain from doing anything, did not grant or withhold any authority or privilege and did not abridge any power or facility, the court was without jurisdiction.

On this appeal, all of the oral evidence taken in the proceedings before the Commission has been reduced to narrative form (R. 81 *et seq.*), under a stipulation of the parties that such narrative is a true and correct statement in narrative form of the oral testimony introduced in those proceedings and that it sets forth in condensed form all oral testimony offered on the trial of the case and which is essential to the decision of the questions presented by the appeal (R. 192, 193). All of the exhibits offered in the proceedings before the Commission, and which were included as a part of Exhibit 1 in the lower court, have been certified to this court as original exhibits (R. 191) and are on deposit with the clerk.

4. Proceedings in This Court.

In accordance with Paragraph 1 of Rule 12 of the Revised Rules of this court, a statement of the grounds upon which the jursidiction of this court is invoked was duly filed by appellant and it subsequently also filed a motion to advance the case for hearing. On May 31, 1932, this court entered an order finding that probable jurisdiction had been shown and advancing the case and setting it for hearing on October 10, 1932, after the cases theretofore assigned for that day.

SPECIFICATION OF ERRORS.

Appellant makes the following specification of errors:

(1) The lower court erred in finding that appellant made no complaint with respect to the only affirmative part of the order of the Interstate Commerce Commission dated December 7, 1931; in finding that said order contains no requirements in respect of the divisions of the so-called joint reshipping or transit rates from Peoria-Pekin to eastern destinations; in finding that said order places no compulsion upon appellant with respect to the divisions of said rates or with respect to the rates or the routes over which they apply; in finding that said order, in so far as it relates to the divisions of said rates, is negative in form and in substance; in finding that it had no jurisdiction to issue an injunction enjoining, vacating, annulling and setting aside so much of the said order as approves and authorizes the application of the present divisions of said rates and enjoining the Railroad Defendants from continuing to apply and enforce said divisions of said rates; and in finding that the petition herein should be dismissed for want of jurisdiction.

(2) The lower court erred in failing to find, as it should have done, that said order of the Interstate Commerce Commission, dated December 7, 1931, in so far as it relates to the present divisions of the so-called joint transit or reshipping rates, is unreasonable, arbitrary and void; in failing to find, as it should have done, that said part of said order is not supported by any evidence introduced in the proceedings before said Commission; in failing to find, as it should have done, that said evidence did not justify said order in so far as it relates to the divisions of said rates; in failing to find, as it

should have done, that said order, in so far as it relates to the divisions of said rates, is affirmative in form and substance and authorizes and approves divisions which operate to confiscate the property of appellant in violation of its constitutional rights; in failing to enjoin, vacate, annul and set aside so much of said order as authorizes and approves the application by the Railroad Defendants of the present divisions of said rates; and in failing to enjoin the Railroad Defendants herein from continuing to apply and enforce said divisions.

SUMMARY OF ARGUMENT.

I.

That part of the order of the Commission here assailed, dealing with the divisions of the joint "reshipping" rates from Peoria-Pekin to the east, is in form, a specific approval of divisions which are unlawful, and in substance, deprives appellant of its constitutional rights. The joint rates involved are published and filed with the Commission as required by law and so long as they remain in effect appellant is required to furnish a service under them. For this service it receives either no compensation or a compensation insufficient to pay its cost of service, all with the approval and authority of the Commission.

II.

The Commission does not have unlimited power to deal with divisions. On the contrary, the law imposes upon that body the duty and obligation of fixing just, reasonable and non-confiscatory divisions of joint rates as between the carriers parties thereto. Any order made by it with respect to divisions will be enjoined if it is unreasonable, arbitrary, not supported by the record or produces a violation of constitutional rights. The Commission has failed to discharge its duty in this case, since it has approved and authorized divisions which are unjust and unreasonable on their face and which produce a confiscation of appellant's property.

III.

The petition filed herein does not require the court in the exercise of its jurisdiction to usurp any administrative function of the Commission. It only prays for an injunction annulling the approval and authority conferred by the Commission upon divisions which operate to confiscate appellant's property, and for an injunction restraining the application of those divisions by the Railroad Defendants herein. Had the court taken jurisdiction, it would have been required to do no more than was necessary to preserve appellant's rights, leaving the Commission free, in the exercise of its jurisdiction and upon a consideration of the record, to fix those divisions which would be proper as between the carriers, parties to the joint rates involved.

IV.

In determining whether or not an order of the Commission is justiciable, the test is whether or not the taking of jurisdiction by a court will require the court to usurp a function of the Commission and substitute its judgment upon an administrative question for that of the Commission. This is the rule established by the decisions of this court, since if a court is permitted to substitute its judgment for that of the Commission with respect to such a matter, the result would be to destroy that uniformity sought to be accomplished by the law. This is not the situation in the case at bar, for the taking of jurisdiction here does not require the court to exercise any power conferred upon the Commission. The court is only requested to protect appellant in those rights granted to it by statute and guaranteed to it under the federal constitution and had jurisdiction to do so.

V.

On the merits, the Commission's order with respect to the divisions of the "reshipping" rates here involved cannot be sustained since those divisions deprive appellant of its statutory and constitutional rights, and are unjust and unreasonable on their face. There is no evidence in the record of the proceedings before the Commission which supports the Commission's conclusion with respect to those divisions. In reaching that conclusion, the Commission failed and refused to fulfill its statutory duty; based its conclusion upon matters not in issue and concerning which there had been no adequate hearing; misconstrued and misapplied the law and determined issues not before it under the pleadings. Its order in that respect should therefore be annulled, and the Railroad Defendants enjoined from enforcing the divisions approved by it.

ARGUMENT.

I.

THAT PART OF THE COMMISSION'S ORDER DEALING WITH THE DIVISIONS OF THE JOINT RESHIPPING RATES FROM PEORIA-PEKIN TO THE EAST IS NOT NEGATIVE IN FORM OR SUBSTANCE. IN FORM, IT IS A SPECIFIC APPROVAL OF DIVISIONS WHICH ARE UNLAWFUL, AND IN SUBSTANCE, IT DEPRIVES APPELLANT OF ITS CONSTITUTIONAL RIGHTS. SINCE THE TAKING OF JURISDICTION BY A COURT WOULD NOT REQUIRE THE EXERCISE BY THE COURT OF AN ADMINISTRATIVE FUNCTION CONFERRED UPON THE COMMISSION, THAT PART OF THE ORDER HEREIN ATTACKED IS JUSTICIABLE.

Appellant's bill in this case was dismissed upon the sole ground that the lower court did not have jurisdiction (R. 184, 185). It was held that so much of the Commission's order as dealt with the divisions of the so-called joint "reshipping" rates was negative both in form and in substance and that for this reason no injunction could be granted. This question of jurisdiction, therefore, lies at the threshold of the case. It has been passed upon by this court many times and, we submit, the action of the lower court was based upon an erroneous view of what this court has held. As a preliminary to a consideration of this legal question, we call the court's attention to certain other circumstances.

A. *The present divisions of the joint "reshipping" rates are violative of appellant's rights under the law.*

As we have said, the present divisions of the joint "reshipping" rates from Peoria-Pekin to the east, allowed to appellant by the Railroad Defendants, are shown by Exhibit 15 before the Commission (R. 90-92)

to be insufficient in most cases to even pay the switching absorptions made by appellant. On much of the traffic appellant receives nothing for its service, and as said by Commissioner Eastman (R. 49), the confiscatory character of a zero division is surely not open to argument. On all other traffic, the earnings of appellant range from ½ cent per hundred pounds to 2 cents per hundred pounds, amounts which in no case pay appellant's cost of operation. Because they collect the money, the Railroad Defendants are able to impose these divisions upon appellant.

Section 1 (4) of the Act to Regulate Commerce (U. S. C. A. Title 49, Sec. 1 to 15a, p. 52) provides:

> "It shall be the duty of every common carrier subject to this Act, engaged in the transportation of passengers or property, to provide and furnish such transportation upon reasonable request therefor * * * and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers."

Thus, a positive duty is imposed upon the Railroad Defendants with respect to the divisions of the joint reshipping rates here involved. It is true that the Commission is given primary jurisdiction to determine what is just, reasonable and equitable, *Terminal Railroad Association* v. *United States,* 266 U. S. 17, 31, but this jurisdiction does not confer upon the Commission the right to fix divisions which are confiscatory. In *L. & P. B. Ry. Co.* v. *United States,* 257 U. S. 114, 117, and *New England Divisions Case,* 261 U. S. 184, 194, both of which cases involved division orders of the Commission, the issue of confiscation was not passed on. In *United States* v. *A. & S. Ry. Co.,* 265 U. S. 274, another case involving a divisions order of the Commission, the rule was stated at pages 284 and 285, where it was said:

> "It is settled that in determining what the divi-

sions should be, the Commission may, in the public interest, take into consideration the financial needs of a weaker road; and that it may be given a division larger than justice merely as between the parties would suggest 'in order to maintain it in effective operation as part of an adequate transportation system,' provided the share left to its connections is 'adequate to avoid a confiscatory result.' *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 477; *New England Divisions Case,* 261 U. S. 184, 194, 195."

The right of a carrier to receive non-confiscatory divisions of joint rates was again recognized in *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U. S. 74, where it was said at pages 88 and 89:

"Appellant's claim that the Commission's order, if enforced, will operate to deprive them of their property without due process of law in violation of the Fifth Amendment to the Constitution. It is well established by decisions of this court that, in order to invoke such constitutional protection, the facts relied upon to prevent enforcement of rates prescribed by governmental authority must be specifically alleged and from them it must clearly appear that the enforcement of the measure complained of will necessarily deny to the utility the just compensation safeguarded to it by the Constitution. *Aetna Ins. Co.* v. *Hyde,* 275 U. S. 440, 447-8 and cases cited. Here the joint rates themselves are not assailed as too low, but the claim is that the prescribed divisions are confiscatory. The same rules as to pleading and proof apply to orders prescribing divisions as to laws fixing rates. There is no allegation in the complaint, or evidence in the record to show that any division to any of the appellants will not yield operating expenses chargeable to the service covered by it plus a reasonable return on property value fairly attributable to that service. There is no foundation in the record for the contention."

Certainly, the right of a carrier to receive non-confiscatory divisions is as certain as its right to receive non-confiscatory rates for service performed by it, and the

latter right has been repeatedly recognized by this court. *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 595, 604; *Northern Pacific Ry. Co.* v. *Department, etc.,* 268 U. S. 39, 43, 44, 45; *Chicago, etc. Ry. Co.* v. *Utilities Commission,* 274 U. S. 344, 350, 351.

It follows from the foregoing that the divisions of the joint "reshipping" rates from Peoria to the east, imposed upon appellant by the Railroad Defendants, are unjust, unreasonable and inequitable and violate appellant's rights under the statute and the Fifth Amendment to the Constitution; and that prescription or approval of such divisions by the Commission adds nothing to their validity. As a matter of law, these divisions were promulgated in violation of law. They constituted a change in divisions effective on February 29, 1920, and were made effective by the Railroad Defendants without agreement of appellant or its predecessors and without the approval of any court or commission having jurisdiction (R. 86), in violation of Section 208 (b), Transportation Act, 1920 (U. S. C. A. Title 49, Sec. 16 to end, p. 382) which reads as follows:

> "All divisions of joint rates, fares or charges, which on February 29, 1920 are in effect between the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by mutual agreement between the interested carriers, or by state or federal authorities, respectively."

B. *The petition filed herein does not require the court to substitute its judgment for that of the Commission with respect to an administrative matter committed to the Commission by law.*

As we have said, the Commission has primary exclusive jurisdiction to fix the amount of the just and reasonable divisions required by Section 1 (4) of the Act to Regulate Commerce, *Terminal R. R. Ass'n.* v. *United States,*

266 U. S. 17, 31, upon a consideration of those factors enumerated in Section 15 (6) of the Act. *New England Divisions Case,* 261 U. S. 184, 194; *United States* v. *A. & S. Ry. Co.,* 265 U. S. 274, 284; *Brimstone R. R. Co.* v. *United States,* 276 U. S. 104, 116, 117; *B. & O. R. R. Co.* v. *United States,* 277 U. S. 291, 300, 301; *B. S. L. & W. Ry. Co.* v. *United States,* 282 U. S. 74, 82. A court has no power to substitute its judgment for that of the Commission in such a manner. *United States* v. *New River Co.,* 265 U. S. 533, 542; *G. N. Ry. Co.* v. *Elevator Co.,* 259 U. S. 285, 291, 292.

But in this case, the court was not asked to substitute its judgment for that of the Commission, nor to say what divisions would be just and reasonable and should be made effective. After setting out the facts and making various allegations, the prayer of the petition is (R. 12) that after final hearing the order of the Commission made on December 7, 1931, in so far as it is complained of, be enjoined, set aside and annulled, and that the Railroad Defendants be enjoined from enforcing or applying against appellant the divisions of the joint "reshipping" rates approved by the Commission. This prayer did not require the court to say what the divisions of the "reshipping" rates should be, or to usurp any administrative function of the Commission. If granted, it only required the annulling of an approval of divisions which must be conceded to be unlawful, and the preventing of their use by the Railroad Defendants under cover of that approval.

C. *The Commission was under a definite obligation to fix just and reasonable divisions of the joint rates here involved.*

Sections 1 (4) and 15 (6) were added to the Act to Regulate Commerce by the Transportation Act 1920 (41 Stat. 474, 486; U. S. C. A. Title 49, Sec. 1 to 15a, pp. 52,

426). Thus, in 1920 for the first time there was placed upon carriers and the Commission a definite obligation with respect to divisions of joint rates. The general purposes of the Transportation Act, 1920, have been announced by this court many times. In *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, this court briefly reviewed the act and said at page 585:

> "It is manifest from this very condensed recital that the act made a new departure. * * * The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in Sec. 15a to be one of the purposes of the bill."

And at page 589 it was said:

> "Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonably compensatory return for all the work it does."

In *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, this court discussed the Transportation Act, 1920, saying at page 478:

> "The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.
>
> * * * * *

> To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety."

The rights and duties of the Commission under the Transportation Act, 1920, with respect to the divisions of joint rates, have also been discussed by this court. In *New England Divisions Case, supra,* at pages 189 and 190, it was said:

> "Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission, new powers were conferred and new duties imposed."

In the same case, after discussing the varied situation of the carriers, it was said at page 191:

> "It was necessary to avoid unduly burdensome rate increases and yet secure revenue adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted: the group system of rate making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter, the weak were to be helped by preventing needed revenue from passing to prosperous connections. * * * The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the

new rate-fixing sections. It was, indeed, indispensable."

Again, in approving the method followed by the Commission in fixing the divisions there involved, this court said in the same case at page 199:

> "Congress did so provide, in effect, when it imposed upon the Commission the duty of determining the divisions."

In *B. S. L. & W. Ry. Co.* v. *United States, supra,* another case involving divisions, this court said at page 82:

> "The Commission by Section 15 (6) is required to consider the condition of each carrier and to determine whether the division of each joint rate is unreasonable or otherwise repugnant to the specified standards and what division will for the future be just, reasonable and equitable. *United States* v. *Abilene & So. Ry. Co.,* 265 U. S. 274, 291."

It follows that under the present law, the Commission had a very definite duty in this case. That duty was not discharged by the approval of divisions which are confiscatory. Nor may the Commission escape the obligation placed upon it by law by putting its disposition of the case before it in any particular form. Since the divisions left in effect by it must be conceded to be unjust, inequitable and confiscatory, it has denied to appellant rights secured to appellant by law and has failed to perform its definite duty. Any order producing such results must be condemned and is necessarily affirmative in effect, at least.

D. *The order in this case, in so far as it relates to the divisions of the joint "reshipping" rates from Peoria-Pekin to the East, is not a negative order under the decisions of this court.*

The decision of the lower court in this case was apparently based upon the theory that since the order of the Commission did not create the situation of which ap-

pellant complained but only dismissed its complaint in so far as the divisions of the joint "reshipping" rates were concerned, that order was therefore negative and could not be enjoined. We submit that the lower court thus adopted a false standard in determining whether or not the order was justiciable. Such a theory disregards the statutory right of appellant to receive just and non-confiscatory divisions, and the legal obligation of the Commission to establish such divisions. It adopts the outward form of the order as determining its legal status, in disregard of the effect produced by that order. It makes the court's jurisdiction depend entirely upon whether or not relief is denied to one party only, without regard to the results produced by such a denial and without regard to whether or not the taking of jurisdiction would require the court to exercise an administrative function of the Commission, which is, after all, the real test. No decision of this court supports such a theory, and many of the authorities cited in the opinion of the lower court as supporting its conclusion, really sustain the jurisdiction which that court denied.

In *Procter & Gamble* v. *United States,* 225 U. S. 282, it appeared that certain car demurrage rules had been put into effect by the railroads, which rules had application to privately owned cars standing upon tracks owned by the industries which owned the cars. The Procter & Gamble Company filed a complaint with the Commission attacking these rules. This court said at page 287:

> "After hearing, the Commission made a report declaring that the rules complained of were in no sense in conflict with the act to regulate commerce, and on the contrary conformed to that act and tended to prevent and repress unlawful preferences and discriminations. An award of relief was therefore denied."

The question at issue in this court was stated at page 292 of the opinion as follows:

> "In other words, the important question is, Is the

authority of the Commerce Court confined to enforcing or restraining, as the case may require, affirmative orders of the Commission, or has it the power to exert its own judgment by originally interpreting the administrative features of the act to regulate commerce and upon that assumption treat a refusal of the Commission to grant relief as an affirmative order and accordingly pass on its correctness?"

This court then dealt at length with the character of the authority conferred upon the Commission by the act creating it, concluding on page 297 by the statement,—

"that it was never considered that there was power in the courts as an original question without previous affirmative action by the Commission to deal with what might be termed in a broad sense the administrative features of the act to regulate commerce by determining as an original question that there had been a compliance or non-compliance with the provisions of the act."

The duty and jurisdiction of the courts was stated by this court in its opinion as follows, at pages 297 and 298:

"Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission, for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred although it may be not technically doing so. *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 547; *Int. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452."

It was, therefore, held (pp. 298, 299) that since the

taking of jurisdiction in that case would (a) create rights not previously in existence; (b) create divided authority on a matter where primary singleness of action was imperative; and (c) create contradiction and confusion which the law sought to avoid, the order attacked was not one of which the courts could take cognizance.

That case involved many considerations not present in the case at bar. There, the decision of the Commission was partly based, at least, upon the thought that the demurrage rules under attack operated to prevent violations of the law, and it was held by this court that the taking of jurisdiction would require the court to usurp an administrative function of the Commission. In this case there is no such situation. The *Procter & Gamble* decision supports appellant's position, for in this case, a violation of appellant's constitutional rights must be conceded; a want of conformity by the Commission to its statutory authority is obvious, and the power of the Commission has been so arbitrarily exercised as to not only transcend its authority, but to constitute a refusal to act in accordance with the obligation imposed upon it by law. In each and all of these circumstances, a court would have jurisdiction under authority of this court's decision in the *Procter & Gamble case, supra.* Certainly, there is no justification in that decision for the argument that an order of the Commission which in form denies relief to one party only is thus made incapable of being adjudicated in court. Nor do the later decisions of this court support such a theory.

In *Hooker* v. *Knapp,* 225 U. S. 302, the order sought to be enjoined was one in which the Commission had denied the entire reduction in rates claimed by complainant in a complaint filed with the Commission. The bill prayed that the Commission be required not only to annul its order but that the case be reopened and the complainants

given further relief (p. 305). The bill was dismissed on the authority of the *Procter & Gamble* decision.

In *Lehigh Valley Railroad* v. *United States,* 243 U. S. 412, the facts were that the railroad had filed with the Commission, pursuant to the provisions of the Panama Canal Act, an application for authority to continue its ownership in a common carrier by water. The Commission, after a consideration of the facts, dismissed the petition. In deciding the case, this court said at page 414:

> "The order of the Commission was negative in substance as well as in form. *Procter & Gamble Co.* v. *United States,* 225 U. S. 282, 292, 293. The risk to which the railroad was left subject did not come from the order but from the above-mentioned section of the Panama Canal Act (amending Section 5 of the Act to Regulate Commerce) making each day of violation a separate offence and the provision of the latter act, Section 10, which imposes a possibly large fine. This risk is the same that it was before the order or that it would have been if appellant had not applied to the Commission, except so far as the findings establish facts that we believe there is no desire to dispute. Without going further it appears to us plain that the decree of the District Court dismissing the bill was right."

Thus, that case was substantially different from the case at bar. Had the court taken jurisdiction, it would have been required to determine whether or not the relations between the boat line and the Railroad Company were competitive, and to this extent would have been required to substitute its judgment for that of the Commission. That is not so in the case at bar. Moreover, as was pointed out, the risk to which the Railroad was left subject resulted from the statute itself and not from the Commission's order; whereas, in this case the Commission's order constitutes the only lawful authority for the application of the present divisions of the reshipping rates.

In *United States* v. *Illinois Central Railroad,* 244 U. S. 82, the Railroad asked that an order of the Commission setting a case for hearing be set aside. After citing its decision in the *Procter & Gamble Case, supra,* this court said at page 89:

> "The notice, therefore, had no characteristic of an order, affirmative or negative. It was a mere incident in the proceeding, the accident of the occasion—in effect, and, it may be contended, in form, but a continuance of the hearing. The fact that the continuance was to another day and place did not change its substance or give it the character described in *Procter & Gamble Co.* v. *United States,* one which constrained the railroad company to obedience unless it was annulled or suspended by judicial decree."

As this court also pointed out (p. 89), the notice of hearing sought to be enjoined imposed no obligation upon the railroad, which might attend the hearing if it saw fit or stay away if it preferred. In the case at bar, however, the approval given by the Commission to the present divisions of the reshipping rates here involved makes those divisions the only ones having any authority. It undertakes to legalize divisions which plainly violate appellant's legal rights. It necessarily constrains appellant to accept those divisions, leaving it only the alternative of foregoing its rights by retiring from the traffic.

In *Manufacturers Railway Company* v. *United States,* 246 U. S. 457, the facts were intricate, but one question involved was that of the divisions to be allowed by the trunk lines to the Manufacturers Railway Company. Complainant, in filing its petition with the Commission, had asked that the divisions to be allowed to it be fixed by the Commission (p. 464). In deciding the case, after a supplemental hearing, the Commission stated that it would not fix the divisions by order at that time (p. 467). The case was thereafter reheard and the Commission is-

sued another report, only suggesting with respect to the divisions that the amount allowed the Manufacturers Railway should not be more than was just and reasonable (p. 469). Thus, notwithstanding the prayer of the petition, the Commission did not in that case fix the divisions by definite order. In deciding the case, this court held (p. 480) that the Commission was not obliged to fix the divisions but had the right to allow the carriers to make their own agreement. In dealing with the question, this court said at pages 482 and 483:

> "It hardly can have escaped attention that the real complaint of appellants respecting the order now under consideration is directed not to what the order requires to be done, but to what it does not require. * * * The real ground for resorting to the courts in this case is the failure to fix divisions. In effect the District Court was asked to perform a function specifically conferred by law upon the Commission. But that court has only the same jurisdiction that formerly was vested in the Commerce Court (Act of June 18, 1910, c. 309, 36 Stat. 539; Act of October 22, 1913, c. 32, 38 Stat. 208, 219); and it is settled that this does not permit the court to exercise administrative authority where the Commission has failed or refused to exercise it, or to annul orders of the Commission not amounting to an affirmative exercise of its powers. *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, 292, *et seq.*"

The case only holds that a court is not given jurisdiction to fix divisions if the Commission fails to do so, since to fix such divisions would require the exercise by a court of an administrative function conferred upon the Commission. We do not ask that divisions be fixed in the case a bar, as we recognize the exclusive primary jurisdiction of the Commission over such a matter. And, we submit, the Commission has exercised that jurisdiction. Under its approval of the divisions involved, those divisions have been and are now being applied and that is all that would have happened in any event. Since

they must be conceded to be confiscatory, a court's jurisdiction to deal with them necessarily follows. Moreover, the case cited was decided in 1918, prior to the enactment of the Transportation Act, 1920, which placed upon the Commission a definite duty with respect to divisions.

United States v. *Los Angeles Railroad Company,* 273 U. S. 299, was a suit brought by the railroad to enjoin a valuation report of the Commission. After a brief discussion of the power of courts to enjoin orders of the Commission, this court said at pages 309 and 310:

> "The so-called order here assailed differs essentially from all those held by this Court to be subject to judicial review under any of those Acts. Each of the orders so reviewed was an exercise either of the quasi-judicial function of determining controversies or of the delegated legislative function of rate making and rule making.
>
> The so-called order here complained of is one which does not command the carriers to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation."

This language, we submit, supports the claim of jurisdiction made in the case at bar. In this case, the Commission certainly exercised its "quasi-judicial function of determining controversies", and finally determined a controversy between appellant and the Railroad Defendants with respect to the present divisions of the joint "reshipping" rates from Peoria-Pekin to the east. A more definite and complete disposition of a controversy could scarcely be made.

Moreover, the Commission's order with respect to the divisions of those rates does withhold an authority, privilege or license, since it deprives appellant of all right to insist that it receive just and reasonable divisions of the

joint reshipping rates; it does abridge a power of appellant, since it deprives appellant of all right to receive proper compensation for a common-carrier service performed by it, a right to which it is constitutionally entitled; it does subject appellant to a civil liability, since appellant has been left in the position of being required by law to perform an interstate transportation service without receiving compensation therefor; it does change appellant's future status or condition, since it deprives appellant of the right to receive, in the future at least, those divisions to which the law says it is entitled; and it does determine a right or obligation of appellant, since it fixes appellant's obligation to perform an interstate common-carrier service without a corresponding right to receive just compensation therefor.

In effect, it commands appellant to perform a service under the joint "reshipping" rates, so long as they are in effect, upon receipt of the divisions which it approves. And in the *Los Angeles Railroad Company Case, supra,* it was indicated that the right of the railroad to a judicial determination of value was preserved; whereas, in the case at bar appellant has no judicial remedy, if the lower court was correct in its decision.

In *Piedmont & Northern Railway* v. *United States,* 280 U. S. 469, the facts were that the railroad filed with the Commission an application for a certificate of public necessity permitting the construction of additional line, including therein an allegation that the Commission was without jurisdiction over the subject matter of the petition because the railroad was an interurban electric railway within the meaning of paragraph 22 of Section 1 of the Act to Regulate Commerce. In addition, the railroad filed a motion that its application be dismissed for want of jurisdiction. Overruling the motion, the Commission took jurisdiction and denied the application; whereupon

the suit was brought to set aside the order of denial. At pages 475 and 476 of its opinion, this court said:

> "Plaintiffs do not complain of the order's denial of a certificate of public necessity and convenience. They concede that no court has the power to compel the Commission to issue such a certificate, since no railroad subject to the provisions of the Act has a right to extend its lines. Therefore, the order denying a certificate, being negative in substance as well as in form, infringed no right of the Railway. Compare *Proctor & Gamble Co.* v. *United States*, 225 U. S. 282; *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 412; *United States* v. *New River Co.*, 265 U. S. 533, 540."

This language emphasizes the different situation in the case at bar, for here appellant has a statutory right to receive just and reasonable divisions of the "reshipping" rates and, we submit, the Commission is under an obligation to grant them. Its refusal to do so therefore infringes appellant's right. The court further held in the case cited that it was controlled by the decision in *Lehigh Valley Railroad* v. *United States, supra,* since the risk of which the railroad complained arose from the statute and not the Commission's order. It was further said at page 477:

> "The order is entirely negative. It is not susceptible of violation and cannot call for enforcement. It does not finally adjudicate the Railway's standing; nor does it enjoin it to do or refrain from doing anything. The penalties provided in paragraph 20 are prescribed not for violation of an order of the Commission, but for violation of the provisions of the statute."

The situation in the case at bar is entirely different. Appellant is not seeking to avoid any liability created by statute. And while the order here attacked does not prescribe the present divisions of the "reshipping" rates in terms, it does adjudicate appellant's standing and require it to submit to the application of divisions which confiscate its property. The difference between the case

cited and the case at bar is illustrated by this court's statement at page 478 of the opinion in the case cited, where it was said:

> "The case is entirely different from those cases where an application for a certificate is alleged to have been erroneously granted, as in *The Chicago Junction Case*, 264 U. S. 258 and *Colorado* v. *United States*, 271 U. S. 153. There, a judicial review is provided in order to protect a legal right of the plaintiff alleged to have been infringed by an order which authorizes affirmative action."

So in this case, judicial review is necessary to protect appellant's legal right to just and equitable divisions, a right which is being daily violated under cover of the Commission's approval, which authorizes affirmative action by the Railroad Defendants.

In *United States* v. *A. B. & C. R. Co.*, 282 U. S. 522, an injunction was sought to set aside a paragraph in a report of the Commission dealing with the reorganization and control of the Railroad Company. The paragraph in question stated the amount which the new company should include in its balance sheet as representing investment in road and equipment. In holding that a court had no jurisdiction to enjoin such a statement, this court said at page 527:

> "The action here complained of is not in form an order. It is a part of a report—an opinion as distinguished from a mandate. The distinction between a report and an order has been observed in the practice of the Commission ever since its organization—and for compelling reasons."

Continuing, this court said at page 528 of its opinion:

> "Even in the regulation of rates, as to which the Commission possesses mandatory power, it frequently seeks to secure the desired action without issuing a command. In such cases it customarily points out in its report what the carriers are expected to do. Such action is directory as distinguished from mandatory. No case has been found

in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review."

This decision has no relation to the case at bar, since what the Commission has said here is at least in order form.

In *Standard Oil Company* v. *United States,* 283 U. S. 235, the suit was brought to set aside an order of the Commission dismissing a claim for reparation. As appears from page 237 of this court's decision, the petition filed in court not only asked for an injunction, but for an affirmative order finding that petitioner was entitled to the relief it claimed and ordering a further hearing, presumably by the Commission, for the purpose of determining the amount to which it was entitled. Also, as pointed out by this court at pages 238 and 239 of its opinion, the determination of the issue presented to the Commission required the application of expert knowledge and presented "unusually compliated and technical tariff situations, the proper determination of which called for the exercise of the trained judgment of that body of experts appointed by law and informed by experience."

In sustaining the claim that the court lacked jurisdiction, this court said at page 238:

> "The Commission made two reports, one following the original hearing, and the other after reargument. The order based upon these reports simply dismissed the complaints; that is to say, the Commission refused to grant any affirmative relief to the appellant. It is plain that the order is negative both in form and effect. The jurisdiction of the district courts (transferred from their predecessor, the Commerce Court), in this class of cases, embraces (1) those brought for the 'enforcement' of orders of the Commission, and (2) those brought to 'enjoin, set aside, annul, or suspend in whole or in part' such orders. It is obvious that this language was not intended to apply to purely negative or-

ders. A negative order which denies relief without more compels nothing requiring enforcement, and contemplates no action susceptible of being stayed by an injunction or affected by a decree setting aside, annulling, or suspending the order.

The question in the present case depends upon the correct interpretation and application of the second subdivision of the act conferring jurisdiction, referred to and quoted *supra;* and necessarily the district court was without jurisdiction under the settled construction of that provision by which the authority of the court is limited to the review of affirmative orders, with 'power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal.' *Procter & Gamble* v. *United States,* 225 U. S. 282, 292-293; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 483; *Piedmont & Nor. Ry. Co.* v. *United States,* 280 U. S. 469, 477."

It is obvious that this decision does not control the case at bar. We have not asked that the court fix the amount of the divisions to which appellant is entitled; nor does the determination of the issue presented require anything more than an application of well known legal principles. Nor does the order here involved deny relief "without more." It affirmatively determines appellant's status; imposes a definite burden upon appellant through acquiescence, and defeats the results sought to be accomplished by the law.

The cases we have cited are all of those which might be said to support the decision of the lower court. For the reasons we have given, none of them do support it. The distinction between those cases and the case at bar is well illustrated in other decisions of this court.

In *Intermountain Rate Cases,* 234 U. S. 476, the facts were that seventeen carriers had made application to the Commission under Section 4 of the Act to Regulate Commerce, for authority to maintain lower rates to and from Pacific Coast points than were maintained to and from

intermediate points. After hearing, the Commission granted part of the relief asked and denied the balance, whereupon the carriers brought a suit asking for a decree enjoining the order.

A major defense in the case was that the action of the Commission was purely negative and therefore not justiciable. At page 481, Section 4 of the Act, as amended June 18, 1910, is set out in full. It prohibited the charging of higher rates for a shorter distance than for a longer distance, the shorter being included within the longer distance; charging a greater compensation as a through route than the aggregate of the intermediate rates; but provided that upon application to the Commission, a carrier might be authorized by the Commission to charge less for longer than for shorter distances.

The present statutory provisions relating to divisions present the same situation. Section 1 (4) of the of the Act requires the maintenance of just, reasonable and equitable divisions between carriers. Section 13 (1) authorizes any common carrier to apply to the Commission to fix such divisions, which must then be fixed by the Commission upon a consideration of the factors enumerated in Section 15 (6). In the case cited, this court pointed out that the jurisdictional argument rested upon the assumption that since the order of the Commission refused to grant a request made, it was purely negative and could not be litigated. It was then said (p. 490):

> "The contention therefore presupposes that the power which from the beginning has been the subject of judicial review by the mere fact of its transfer to the Commission was made arbitrary. Besides, the proposition disregards the fact that the right to petition the Commission conferred by the statute is positive and while the refusal to grant it may be in one sense negative, in another and broader view it

> is affirmative since it refuses that which the statute in affirmative terms declares shall be granted if only the conditions which the statute provides are found to exist."

In this case as in that one, the right of appellant to receive a fair return for service performed by it antedates the Commission; the right of appellant to petition the Commission is positive and conferred by statute; and the duty of the Commission is definite. While that part of the order of the Commission here under attack denied the relief requested, it is certainly affirmative since it denies to appellant those just and reasonable divisions required by the statute.

United States v. *Merchants, etc. Association,* 242 U. S. 178, involved certain reports of the Commission supplemental to the order involved in the *Intermountain Rate Cases, supra.* The action was brought by four cities who claimed that they had been injured by the maintenance of rates higher than those to more distant points. The order of the Commission had granted part of the relief asked, as in this case, but not all of it. Apparently, the question of the court's jurisdiction was not raised.

In *Skinner & Eddy Company* v. *United States,* 249 U. S. 557, the suit was brought to set aside an order of the Commission directing the removal of a discrimination which the Commission held resulted from a 4th Section order previously made by it. The railroads undertook to remove the discrimination by increasing the rates to the more distant points, and the plaintiff sought to enjoin the increased rates. In defending the action, it was claimed that the court did not have jurisdiction of the subject matter of the suit. Dealing with this defense, this court said at page 562:

> "The contention proceeds apparently upon a misapprehension of plaintiff's position. If plaintiff had sought relief against a rate or practice alleged to be

> unjust because unreasonably high or discriminatory the remedy must have been sought primarily by proceedings before the Commission (citing cases); and the finding thereon would have been conclusive, unless there was lack of substantial evidence, some irregularity in the proceedings or some error in the application of rules of law (citing cases). But plaintiff does not contend that 75c is an unreasonably high rate or that it is discriminatory or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission. (citing cases) * * * The District Court properly assumed jurisdiction of this suit."

In the *Chicago Junction Case,* 264 U. S. 258, the suit was brought to set aside an order of the Commission permitting the acquisition by the New York Central Railroad of the Chicago River & Indiana Railroad and the Chicago Junction Railway. The order made by the Commission was permissive only, and imposed no obligation upon anybody. The defendants claimed that the order was not subject to judicial review, and in passing upon this defense, this court said at page 263:

> "Whether this order can be described properly as legislative may be doubted. It is clear that legislative character alone would not preclude judicial review. Rate orders are clearly legislative. *Prentiss* v. *A. C. L. Ry. Co.*, 211 U. S. 210, 226. Nor would the further fact that the order is permissive preclude review, if by that term is meant an order which, in contradiction to one compelling performance, authorizes a carrier to do some act otherwise prohibited."

Certainly, that part of the order attacked herein authorizes the Railroad Defendants to continue the application of divisions which confiscate appellant's property and are thus prohibited both by statute and by the Con-

stitution. After distinguishing the *Illinois Central Railroad Company Case, supra,* by pointing out that the notice there involved had no characteristic of an order, this court in the case cited, referred to the *Procter & Gamble Case, supra,* and other cases to the same effect, saying at page 264:

> "In *Procter & Gamble Co.* v. *United States,* 225 U. S. 282; *Hooker* v. *Knapp,* 225 U. S. 302; and *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412, judicial review was refused, not because the order was permissive, or because it was negative in character, but because it was a denial of the affirmative relief sought. This Court declined to interfere, because to do so would have involved exercise by it of the administrative function of granting the relief which the Commission, in the exercise of its jurisdiction, had denied. Here the order complained of is an affirmative one. That is, it grants the relief sought. Compare *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 483."

This language is definite in stating the ground upon which the decision in the *Procter & Gamble Case, supra,* rested; a ground which, we submit, is obvious from the language used in that decision. In the case at bar, there is no request or requirement that the court exercise an administrative function of the Commission. And the order is affirmative in so far as it relates to the divisions of the "reshipping" rates, since it grants to the Railroad Defendants the relief requested by them; namely, the Commission's approval of the divisions established by them.

The Commission was under the same duty in the case at bar as rested upon it in the *Chicago Junction Case, supra.* At page 265 of the opinion in that case it is said:

> "Congress by using the phrase 'whenever the Commission is of opinion, after hearing,' prescribed quasi-judicial action. Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest.

> It may form this judgment only after hearing. The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it."

Section 15 (6) of the Act also contains the words,

> "Whenever, after full hearing upon complaint * * * the Commission is of opinion, etc."

This language imposed a duty upon the Commission in this case; a duty in which it failed.

The case of *United States* v. *New River Company*, 265 U. S. 533, presented almost the same facts as the case at bar. The suit was to set aside an order of the Commission which, it was alleged, approved a rule of coal car distribution known as Rule 4. The rule attacked was being applied by the railroads but had not been established by any order of the Commission. The New River Company filed a complaint attacking the rule and a Division of the Commission held that it was improper and approved a different rule known as the 150 Per Cent Rule. The Division, however, made no order requiring the application of the different rule, only saying that it expected the railroads to apply that rule.

A rehearing was granted and the entire Commission reversed the decision of the Division and approved Rule 4. It made no order, however, requiring that rule to be maintained, and did nothing else by way of order except to dismiss the plaintiff's petition to it. The suit was thereupon brought, not only to set aside the order of the Commission, but to enjoin the Railroad Defendants from applying the rule approved by the Commission. The plaintiff was successful in the lower court and the United States appealed. At page 539 of its decision, this court said:

> "The appellants contend the order is negative and therefore not subject to review by the court. They cite *Procter & Gamble Co.* v. *United States*, 225 U.

S. 282; *Hooker* v. *Knapp*, 225 U. S. 302 and *L. V. Ry.* v. *U. S.*, 243 U. S. 412."

After stating the facts in the *Procter & Gamble Case, supra,* this court said with respect to it (p. 539):

> "The question before this court (p. 292) was whether the Commerce Court had power to exert its own judgment by originally interpreting the administrative features of the Act to Regulate Commerce, and upon that assumption to treat the refusal of the Commission to grant the relief prayed for as an affirmative order, and accordingly to pass on its correctness. *Hooker* v. *Knapp* and *L. V. Ry. Co.* v. *U. S.* were decided on the authority of the *Procter & Gamble Case.* The opinion in that case, when viewed in the light of the report of the Commission, furnishes no support for appellant's contention here. In all of these cases affirmative relief sought was denied by the Commission. Judicial review was refused on that ground. The taking of jurisdiction in such cases would involve determination by the courts whether relief denied by the Commission in the exercise of its powers, should be granted."

Dealing with the case then before it, this court said at pages 540 and 541:

> "The mere fact that the order of the Commission dismisses the complaint of shippers against Rule 4 does not make it a negative order. * * * The order expressly includes the findings and conclusions stated in the report. It is not merely negative. Clearly, the order permits and authorizes the carriers to apply Rule 4. If that rule is illegal, as alleged, such permission and authority will not sustain it, and suit will lie to set it aside. The *Chicago Junction Case, supra.* Plainly, it was the intent and purpose of the Commission that Rule 4 should be applied in place of the 150 per cent rule. The effect of the order is to grant the relief sought by the operators of local mines. We hold that the District Court had jurisdiction."

We submit that this decision is conclusive in the case at bar. The *New River Case* and this case passed

through the same vicissitudes before the Commission. To paraphrase the language of this court in the *New River Case,* the order attacked in the case at bar expressly includes the findings and conclusions stated in both reports and is not merely negative. It clearly permits and authorizes the Railroad Defendants to apply divisions of the "reshipping" rates, which, it must be conceded, are noncompensatory and insufficient. If those divisions violate appellant's rights, the permission and authority of the Commission will not sustain them, and this suit will lie to enjoin their application. It is plainly the intent and purpose of the Commission in the case at bar that the divisions which we attack should be applied and the effect of the order is to grant that benefit to the Railroad Defendants. And the decision in the *New River Case, supra,* is definite in stating that the refusal to take jurisdiction in the *Procter & Gamble Case, supra,* was based upon the fact that to do so would have required the court to exercise a power conferred upon the Commission.

The trial court decided the issue of jurisdiction against appellant because the Commission refused to act with respect to the divisions of the joint "reshipping" rates. In the opinion it is said (R. 180):

> "After an examination of the facts, the Commission found that the divisions were not unfair and dismissed the complaint. It entered no other order; it merely declined to legislate."

This statement errs in fact, for the Commission's order here attacked did not direct a dismissal of appellant's complaint. The opinion then continues, referring to what the Commission did:

> "It did not order the Alton or its connecting carriers to abide by the previously maintained divisions; it did not direct the future maintenance of the existing divisions; its action was equivalent to say-

ing 'We do not find the situation such that we should fix divisions; that is, we find no reason to exercise our legislative administrative power.' "

Again, it is later said in the opinion (R. 184):

"To exercise jurisdiction would amount to the determination of questions which the Commission has refused to consider in its legislative and administrative capacity and which we are therefore not free to consider."

We submit that in reaching these conclusions under the facts in the case at bar, the lower court misconstrued and misapplied the decisions of this court and failed to appreciate the requirements of the statutory law. The fact that the order assailed denies the relief requested with respect to the divisions of the joint "reshipping" rates does not determine the question. This was also the form of the order in the *Intermountain Rate Cases, supra,* and the *New River Case, supra.* The failure of the order to prescribe in terms the present divisions of the "reshipping" rates is not decisive, for this was the situation under the orders attacked in the *New River Case, supra,* the *Intermountain Rate Cases, supra,* the *Skinner & Eddy Case, supra,* and the *Chicago Junction Case, supra.*

Nor is it decisive that all the relief requested by appellant was not granted by the Commission; that appellant is left in the same position with respect to the divisions involved as it was when it went to the Commission; and that appellant and the Railroad Defendants are left free to change those divisions. The same circumstances obtained in the cases just cited. The important considerations are the effect of that part of the order here attacked, whatever its form, and whether or not the taking of jurisdiction by the court would have required it to usurp an administrative function of the Commission.

Thus, in the *New River Case, supra,* this court said (p. 541) that the effect of the dismissal order of the Commission was to grant the relief sought by the local mines in their petition for rehearing. In the case at bar, the effect of the Commission's order, in so far as it relates to the divisions of the "reshipping" rates, is to grant the relief sought by the Railroad Defendants in their petition for rehearing. That part of the order meets the test prescribed in the *Los Angeles R. R. Co. Case, supra,* since it fixes a liability and obligation of appellant.

Its character and effect may be tested by assuming that the Commission had made an order prescribing the present divisions of the joint "reshipping" rates here involved. Certainly, a court would have jurisdiction of the order in that form. Yet its effect would have been the same as that of the order made. It would have required no change in existing divisions, and would have left the parties as it found them. It would have denied the relief requested by appellant and granted that requested by the Railroad Defendants. If set aside, such action would not have left reasonable divisions in effect. It would not have left the railroads free to make any divisions they wished, but this is an unimportant difference, since the Railroad Defendants are now applying the divisions approved by the Commission in the order made.

And it is certain that the taking of jurisdiction under the petition filed herein by appellant would not require the court to usurp any administrative function of the Commission. This constitutes the marked distinction between the case at bar and the cases relied upon by the lower court and referred to herein. In the *Procter & Gamble Case, supra,* the court would have been required to fix proper demurrage rules after a consideration of payments made by railroads for the use of private cars. In the *Hooker Case, supra,* and the *Standard Oil Com-*

pany Case, supra, the court would have been required to determine the reasonableness and applicability of rates under detailed and intricate tariffs. In the *Lehigh Valley R. R. Co. Case, supra,* the court would have had to determine whether or not competition existed in fact. In the *Manufacturers Railway Co. Case, supra,* the court was asked to fix divisions. In the *Piedmont & Northern R. R. Co. Case, supra,* the court was asked for a declaratory decision. None of these situations obtain in the case at bar, for we do not ask the court to fix divisions or instruct the Commission with respect thereto. We only ask that appellant's constitutional rights be protected; rights of which, we submit, appellant cannot be deprived because of the wording of the Commission's order.

The opinion of the lower court also errs in other respects. Thus, the court said (R. 179):

> "Joint rates must be filed with the Commission and when so filed and approved they become matters controlled by official edicts of that body. But divisions, in the absence of relieving orders, are not so filed but are left to and fixed by the carriers themselves."

But the jurisdiction of the Commission over divisions is as full and complete as its jurisdiction over rates. True, rates are required to be filed with the Commission and divisions are not, but this is because rates directly affect the public and the filing of them with the Commission gives that notice which the law requires. Divisions, on the other hand, do not directly affect the public and are thus left primarily to agreement between the carriers. This fact, however, does not affect the Commission's jurisdiction over them.

Continuing, the lower court said in its opinion (R. 179):

> "Clearly there must be some administrative order

> upon divisions, in pursuance of the Commission's legislative power before it can be said that legislation has occurred."

Precisely the same thing is true of rates. It cannot be said that the Commission has legislated upon rates merely because they have been filed with the Commission. And in the case at bar, the Commission has made an administrative order with respect to the present divisions of the joint "reshipping" rates. It has effectually prescribed them for the future.

The lower court further held (R. 180) that in dealing with the divisions of the "reshipping" rates here involved, the Commission had only elected not to exercise its legislative administrative power and that a court had no power by mandatory injunction to require an administrative branch of the Government to exercise such power. We submit that this is in error, for the Commission, in dealing with divisions of joint rates under the present law, does not have the same choice to act or not to act as an ordinary legislative body would have. Its obligations are fixed by that law which creates it. The right of appellant to receive just and reasonable divisions of the rates here in issue is established by Section 1 (4) of the Act, and the Commission's positive duty is to fix such divisions. That duty is not discharged by the approval of divisions which are certainly confiscatory.

And had the Commission refused to take jurisdiction and exercise its authority in the case at bar it could have been required to do so through mandamus. *Interstate Commerce Commission* v. *Waste Merchant's Ass'n.*, 260 U. S. 32, 33, 34. But the Commission has in fact legislated in the case at bar. It took jurisdiction of the case, held hearings, received all of the evidence, and then decided the case.

In citing the *Procter & Gamble Case, supra* (R. 181) the lower court lost sight of the ground upon which the denial of jurisdiction was based. In citing the *Manufacturers Railway Company Case, supra* (R. 182), no consideration was given to the fact that the court was there asked to fix divisions. In citing the *A. B. & C. Railway Company Case, supra* (R. 183), it was apparently not considered that what is here sought to be enjoined is designated as an order by the Commission and is in fact an order. In citing the *Los Angeles R. R. Co. Case, supra* (R. 183), it is said (R. 184) that the order here complained of does not withhold any authority or privilege or abridge any power. It seems to us that it plainly does, since as a direct result of it appellant is denied the right and privilege of receiving compensation for a common-carrier service performed by it and is deprived of the power of insisting that it receive such compensation.

In attempting to distinguish the *New River Company Case, supra,* from the case at bar the lower court said (R. 183):

> "In the instant case, the order does not authorize or permit the divisions complained of, it is merely a refusal upon the part of the Commission to interfere, and, as the Court said in the last cited case, 'the taking of jurisdiction in such cases would involve determination by the courts whether relief denied by the Commission in the exercise of its powers, should be granted."

Obviously, the lower court did not appreciate the effect of the decision of this court in the *New River Case, supra.* As we have heretofore pointed out, the Commission's order there involved only granted to some of the mines the relief sought through the medium of a statement in the report that the rule they asked was the proper one. The order itself only dismissed the peti-

tion filed with the Commission. In this case, the dispute between appellant and the Railroad Defendants is as sharply drawn as was the dispute between the different coal companies in the *New River Case*. And in both cases, the Commission decided the issue through a finding in the report, which statement, in the case at bar, is reiterated in the order.

The permission and authority granted by the Commission in the *New River Case* was certainly no more comprehensive than the permission and authority granted the Railroad Defendants in the case at bar. The extent of the permission and authority here granted may be judged by the fact that although the Commission has conceded authority to stop the practice, appellant is being currently required to handle traffic for no compensation whatever. Nor would the taking of jurisdiction require this court to determine whether or not the divisions asked for by appellant were proper, since no paragraph of the petition in the lower court requests that this be done.

The basis upon which the decision of the lower court is founded is summed up in the statement heretofore quoted (R. 184) that:

> "To exercise jurisdiction would amount to the determination of questions which the Commission has refused to consider in its legislative and administrative capacity and which we are therefore not free to consider."

This statement is in error. The Commission did in fact consider the propriety of the present divisions of the joint "reshipping" rates and held them to be just and reasonable. And the lower court was free to consider the matter since it was not asked to substitute its judgment for that of the Commission. It was only asked to determine whether or not those divisions approved by the Commission violated appellants' legal rights.

This suit was brought in the only court having jurisdiction, *Venner* v. *M. C. R. R. Co.*, 271 U. S. 127, 130, and the court certainly had power to enjoin the Railroad Defendants as prayed. *B. & O. R. R. Co.* v. *United States*, 279 U. S. 781, 785. Under these circumstances, if the order here assailed is not justiciable, appellant is deprived of its right to a judicial review of an obvious violation of its constitutional rights. The holding that such a result may be justified by a form of words is repugnant to every principle of law and justice.

II.

ON THE MERITS, THAT PORTION OF THE COMMISSION'S ORDER HEREIN ATTACKED, RELATING TO THE DIVISIONS OF THE "RESHIPPING" RATES, SHOULD HAVE BEEN SET ASIDE, AND THE RAILROAD DEFENDANTS ENJOINED FROM APPLYING THOSE DIVISIONS.

The conclusion is obvious that on the merits, that portion of the Commission's order of December 7, 1931, dealing with the divisions of the "reshipping" rates is wrong and should be set aside. It is indeed so obvious as to scarcely require argument in view of the earnings left to appellant under the divisions approved by the Commission. We, nevertheless, desire to call to the court's attention some of the more obvious errors in fact and law committed by the Commission in reaching the conclusion it did.

A. *The divisions approved by the Commission violate appellant's statutory and constitutional rights.*

This is a matter to which we have heretofore referred. The fact was proven on the record before the Commission and is so obvious as to require no argument. Indeed, in the hearings before the Commission, no conten-

tion was made by the Railroad Defendants that the divisions allowed by them to appellant out of the "reshipping" rates were just, reasonable or compensatory. On the contrary, it was only suggested that appellant should avoid the confiscation of its property by going out of the business and canceling its participation in the rates, a matter to which we shall hereafter refer.

B. *The Commission erred in holding that for the purposes of this case, the inbound and outbound shipments to and from Peoria-Pekin were not separate and distinct shipments.*

In the dissent to the first report of Division 5 of the Commission (R. 33 *et seq.*) is stated those reasons which prompted a majority of the Commission to reach the conclusion that it did upon rehearing. The second report denies just and reasonable divisions of the "reshipping" rates to appellant partly because of the theory that the movement of grain, grain products and grain by-products from Peoria-Pekin to the east is an integral part of the prior movement of those commodities or their equivalents into Peoria-Pekin from points west thereof; and because of the thought that the case involved the propriety of the transit arrangements at Peoria-Pekin. Thus, it is said in the dissent to the first report (R. 34):

> "To treat the inbound and outbound shipments as separate and distinct is hopelessly repugnant to the principle of transit. * * * The underlying theory of transit is that of a continuous transportation from the point of origin to the ultimate destination."

Again, it is further said in the dissent to the first report (R. 35):

> "Under all of these circumstances is it the part of wisdom for this commission now, after all of these many years of approbation, by court and commis-

> sion alike, of a practice which antedates the interstate commerce act itself, *Transit Case*, 24 I. C. C. 340, 348, to throw into the discard a principle or theory which is inseparably bound up with the practice of transit, which has been and is beneficial to both carrier and shipper, and which has been ingrained into and become an exceedingly important part of the business structure of the country, solely because of *obiter dicta* observations made by the Supreme Court."

The *obiter dicta* observations there referred to are those said to be contained in the decision of this court in *A. T. & S. F. Ry.* v. *United States*, 279 U. S. 768.

In attempting to state appellant's position, the Commission said in its second report (R. 45):

> "The complaint of the Alton rests squarely upon its contention that on this traffic accorded transit at Peoria it must be regarded as an originating carrier because, it contends, the outbound shipments from Peoria on these proportional rates are entirely separate and distinct from all prior transportation. To this contention we cannot subscribe."

It was further said (R. 46):

> "In this case therefore we must give full effect to the transit provisions at Peoria under which these shipments move in our consideration of the lawfulness of the divisions received by the respective carriers, parties to these outbound reshipping rates. * * * Thus regarded, the proportional rates from Peoria are merely parts of the through rates, and the Alton is only an intermediate and not an originating carrier on this traffic. If the claim of the Alton were sustained and these shipments accorded transit at Peoria were regarded as local shipments, it would inevitably follow that the transit provisions at Peoria would be of no effect on this traffic and the local and not the reshipping rates from that point would be applicable."

We submit that the holding of the Commission in this respect was wrong. As appears from the petition filed with the Commission (R. 13 *et seq.*), the only issue pre-

sented to that body for adjudication was the propriety of the divisions of the joint "local" and "reshipping" rates from Peoria-Pekin to the east. No issue was raised as to the rates inbound to those points or the traffic moving under them. The determination of the issue presented did not at all depend upon the transportation of any commodities to Peoria-Pekin; upon transit at that point; or upon the through movement of commodities under through rates through those points. This results from the character and application of the rates.

As we have said, the rates to Peoria-Pekin are separately published rates, either local or proportional. Thus, if the Atchison, Topeka & Santa Fe Railroad hauled a shipment of grain, its products or by-products into Peoria, it might do so on a local rate if the shipment originated at a local station on its line, or on a proportional rate if the shipment originated at a transit point such as Kansas City and had had previous movement into Kansas City. In either case, the rate applied would be published by the Santa Fe only, and neither appellant nor any Railroad Defendant would be a party thereto or perform any transportation service thereunder. The Santa Fe would collect and retain all of the revenue for the movement into Peoria-Pekin. (R. 93, 104, 105).

Certainly, such a movement and the revenue collected for it has no bearing upon the division of a joint rate charged by different carriers for the movement of a different shipment between different points. The fact that through rates might apply via Peoria-Pekin on shipments moving through those points is not important, even though the joint "reshipping" rates from Peoria-Pekin were parts of those rates. The distinction between joint rates and through rates is pointed out in

St. L. S. W. Ry. Co. v. *United States,* 245 U. S. 136, note 2, p. 139. In this case the shipments via Peoria-Pekin were not through shipments under through rates, but in any event, the point does not control the fixing of the divisions of the joint rates involved.

Nor should transit at Peoria-Pekin have been given any weight in determining the issue presented to the Commission. The only effect of transit at those points is that it determines the actual amount of the "reshipping" rate from those points to the east. Shipments from Peoria-Pekin under those rates might legally be new shipments but because made within twelve months after an inbound movement into Peoria, they would move upon a lower rate. Other shipments might also be new shipments legally, but would take the higher joint "local" rate because not accompanied by billing showing an inbound movement within the preceding twelve months.

Had the Commission seen fit to allow to appellant proper divisions of the joint "reshipping" rates, such a disposition of the case would have had absolutely no effect upon either the rate or transit situation. The rates would still have applied to, from and via Peoria and Chicago as they had always applied. Their volume would not have been changed. Transit would have remained and been applied as it has always been applied.

Even upon the Commission's rate and transit theory, its decision was wrong, for in any case appellant was at least an intermediate carrier. As such a carrier performing a carrier service it was entitled to receive for its services its fair proportion of the entire revenue collected. Yet, the Commission's conclusion gives it nothing on much of the traffic and not enough on the balance of the traffic to pay its operating expenses. We

know of no rule of law which requires a carrier to perform its services for no compensation merely because it is an intermediate carrier.

Moreover, the Commission's decision with respect to the character of the outbound shipments from Peoria-Pekin under the joint "reshipping" rates was wrong legally under the facts in this case. As we have said, when a shipment to Peoria-Pekin reaches either of those points it is delivered to the grain elevator, the car is released and the freight charges are paid. Every liability of the inbound carrier ceases. At this time no one knows what disposition will be made of the shipment. It may be sold or resold; it may remain in Peoria or Pekin or it may be manufactured into another commodity and be shipped elsewhere, in which case it may move either under one of the "reshipping" rates or a local rate. Its identity is not preserved, but it is mixed with other shipments of the same kind.

When the outbound shipment is made under the "reshipping" rates the commodity need not be the same commodity as that which moved inbound to Peoria-Pekin. A new bill of lading is issued and a different car furnished (R. 93, 94). These were the precise circumstances in the case of *A. T. & S. F. Ry. Co.* v. *United States,* 279 U. S. 768. This court there said at page 774 in stating the contentions made by the plaintiff:

> "The Santa Fe, regarding the grain in storage at Kansas City as tonnage which, although temporarily held in abeyance, is in the course of a through movement and, as such, is to be held on its lines, makes this argument, etc."

Dealing with this contention, this court said at page 777:

> "The contention that the Santa Fe's canceled tariff was legally part of a through rate is also unsound. The argument rests upon a fiction—the

> fiction of a through rate with transit privilege. As applied here, the fiction is inconsistent with every fact of legal significance."

Yet in the case at bar, under identical facts, the Commission has held (R. 46) that shipments via Peoria-Pekin, moving from those points under the joint rates here involved, are through shipments moving under through rates with transit privilege. Dealing further with the claim made in the case cited, this court said at page 779:

> "When the outbound shipment from Kansas City is made, the grain goes forward on a new bill of lading at the balance of the through rate. Obviously, this practice cannot convert the independent shipment of grain from Kansas City to the Gulf via the Southern into a through movement from Dodge City to the Gulf. The two transportation services are not only entirely distinct, but they are often rendered in respect to wholly different merchandise. This convenient fiction is employed as a juristification for the discrimination involved in giving rates lower than those ordinarily applicable to the service outbound."

The Commission has said (R. 46) that the foregoing decision is not in conflict with its views in the case at bar. It seems to us that they are in direct conflict. This court's decision as to the character of the outbound shipments from Kansas City was certainly not dictum, since it disposed of a major contention made by the plaintiff in the case cited. On the facts presented to it, this court held that those outbound shipments were not parts of through shipments under through rates. On identical facts, the Commission has held the direct opposite.

Nothwithstanding the Commission's statement to the contrary (R. 45), appellant did not, for the reasons given, base its claim before the Commission solely upon the independent character of the shipments under the

joint "reshipping" rates. It was claimed that they were new shipments (R. 108), but only from the standpoint of the case presented. They were necessarily new shipments from a divisions standpoint, since the only rates sought to be divided applied only on shipments from Peoria-Pekin and could only be divided among the railroads publishing them and performing a service under them.

C. *The Commission erred in concluding that appellant should be required to retire from the handling of traffic under the joint "reshipping" rates and cancel its participation in those rates.*

It must be inferred that the Commission decided in this case that appellant should cease handling traffic under the joint "reshipping" rates and cancel its participation in those rates. This inference is compelled by the volume of the divisions imposed upon appellant with the Commission's approval. It was also stated rather definitely, for the Commission said (R. 47, 48):

> "The proportional rates from Peoria apply in connection with the Alton, not only via Chicago, Joliet and Dwight, but also via junctions south of Dwight, such as Chenoa, Ill., to which the haul of the Alton is considerably shorter than to Dwight, and it is not necessary for this traffic after it reaches the Alton to move via its northern junctions. All of this traffic may now move through Ashland and Springfield, Ill., in connection with the Baltimore & Ohio. * * * On grain and by-products from the Northwest the proportional rates from Peoria are now restricted so as not to apply via Chicago, and the same restriction could readily be made on grain products."

The Commission's reason for reaching this conclusion is not stated. It is only certain that it concluded the "reshipping" rates should not apply over appellant's line through Chicago, Joliet and Dwight. The Railroad Defendants apparently do not wish this result, since

they have abandoned their efforts to cancel the rates. Some of them which do not have rails to Peoria wish to continue appellant's participation in the traffic, so that they may also participate by receiving the traffic at junctions north of Peoria-Pekin (R. 140). Appellant does not wish to give up its present right to handle traffic under the rates involved and, we submit, may not be required to do so on the record made.

This case did not involve any question of routes or rate application. It only involved the division of joint rates already in effect and which had been in effect for many years. A decision on this issue which takes into account the propriety of the rates and the routes over which they applied, is wrong for a variety of reasons. One is that there was no question of rates or routes in the case, and appellant was not advised that there would be. Another is that those parties who would have a vital interest in the cancellation of appellant's route from Peoria-Pekin to the east were not parties to the proceedings before the Commission and were not heard. We refer to those shippers who, when the Railroad Defendants attempted to cancel some of the joint "reshipping" rates via appellant's line, objected so strenuously that the canceling tariff was suspended by the Commission and thereafter voluntarily withdrawn (R. 167). Another is that the record does not contain sufficient evidence to justify a direct or indirect requirement that appellant cancel its participation in the "reshipping" rates.

At the present time appellant is a party to the "reshipping" rates and not only has an absolute legal right to engage in transportation under them, but has a legal obligation to do so. We might concede the possible jurisdiction of the Commission upon a proper record, to require appellant to cancel its participation in these

rates. But that is not the situation presented. Apparently recognizing the insufficiency of the record and that questions of rates and routes were not within the issues made in the case, the Commission has sought to produce the result desired through indirection, by the approval of divisions which, if continued in effect, will certainly compel appellant to withdraw from the traffic.

The Commission has frequently held that a failure of carriers to agree upon divisions is of no importance in fixing rates, *Boston Wool Trade Ass'n.* v. *A. & K. Ry. Co.*, 142 I. C. C. 39, 41, 42; *Limestone from Illinois Points*, 74 I. C. C. 345, 348; *Through Rates from Buffalo-Pittsburgh Territory*, 36 I. C. C. 325, 328; and that the application of rates cannot be made dependent upon the existence of divisions *National Lumber Co.* v. *A. F. & S. Ry. Co.*, 50 I. C. C. 133, 134; *Gwinn Bros.* v. *C. & O. Ry. Co.*, 56 I. C. C. 298, 300. It would, therefore, seem that the raising of a divisions question would not require or justify a decision on the propriety of the rates sought to be divided.

D. *In passing upon the divisions of the "reshipping" rates, the Commission failed to give proper consideration to the matters which the law required it to consider and disregarded the evidence relating thereto.*

Section 15 (6) of the Act to Regulate Commerce (U. S. C. A. Title 49, Sec. 1 to 15a, p. 426) prescribes those matters which must be taken into consideration by the Commission in fixing divisions. To give due and proper consideration to these matters is an obligation of the Commission, and divisions fixed by it without that consideration will not be sustained. *New England Divisions Case, supra,* page 194; *United States* v. *A. & S. Ry. Co., supra,* page 284; *Brimstone R. R. Co.* v. *United States, supra,* pages 300, 301. The proof submitted by appel-

lant in this case to the Commission covered all of these matters. This appears from the majority report of Division 5 upon the first submission of the case, and the statement in the majority report on rehearing (R. 48) that

> "The other matters which section 15 (6) requires us to consider in our determination of divisions of joint rates, facts with respect to which are of record and which we have considered in reaching our conclusions herein, are sufficiently recited in the original report."

It is obvious, however, from a reading of the second report of the Commission that its decision with respect to the divisions of the joint "reshipping" rates was not at all based upon any consideration given by it to those matters which, under the law, it should have considered. On the contrary, the report affirmatively shows that with the exception of the importance of appellant's service to the public, the only considerations which moved the Commission to reach the conclusion it did were those relating to matters not in issue and not presented to it for adjudication. With respect to the importance of appellant's service the Commission said, after referring to the application of various rates not involved in the proceeding and to transit generally (R. 48):

> "These facts are important in our consideration of 'the importance to the public of the transportation services' of the Alton for the performance of which it is here seeking increased divisions, an element which section 15(6) of the act requires us to consider. No shipper or community has expressed any concern over the continuance of those transportation services by the Alton, and this record affords no support for a finding that they are important to the public."

It may only be concluded from this language that in its second report, the Commission decided that the transportation service of appellant under the joint "reship-

ping" rates was of so little importance to the public that appellant should receive nothing for that service. We submit that this is certainly not so. There is a limit beyond which even the Commission may not go in assigning weight to the various factors enumerated in Section 15 (6) of the Act. If it reaches a conclusion which is unreasonable or arbitrary or produces a violation of constitutional rights, the fact that such a result is reached upon what is said to be a consideration of the matters enumerated in the statute adds nothing to the validity of the conclusion. This has been held many times by this court. *Manufacturers Railway Company* v. *United States, supra,* page 481; *United States* v. *Chicago, etc. R. Co.,* 282 U. S. 311, 327; *Railroad Commission Cases,* 116 U. S. 307, 331; *Reagan* v. *Farmers Loan & Trust Company,* 154 U. S. 362, 399; *C. M. & St. P. R. Co.* v. *Wisconsin,* 238 U. S. 491, 501. And in direct relation to the matter of public interest, this court said in *Northern Pacific R. Co.* v. *North Dakota,* 236 U. S. 585, at page 595:

> "The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement."

In *United States* v. *A. & S. Ry. Co., supra,* a case involving divisions and the power of the Commission under Section 15 (6) of the Act, it was specifically held (pp. 284, 285) that divisions fixed after a consideration of the matters enumerated in the law must be "adequate to avoid a confiscatory result." Moreover, any finding of the Commission that the continuance of appellant's service under the joint "reshipping" rates was not in the public interest was contrary to the evidence in the record. The only evidence relating to this subject was offered by appellant and affirmatively showed that

appellant operated one of the oldest railroads in the State of Illinois; that its service between Peoria on the one hand and Dwight, Joliet and Chicago on the other, was of the greatest importance since it served a large community dependent upon that line for transportation (R. 113). Nothing was offered in contradiction of this evidence.

The finding of the Commission in this respect, thus made without evidence, is also directly contrary to its decision in *C. & A. R. R.* v. *T. P. & W. R. R.*, 146 I. C. C. 171, 176, where it was held that public interest required the continuance of transportation by appellant over the same line of railroad as that used in transporting traffic under the "reshipping" rates here involved.

The quoted statement of the Commission in its second report is also contrary to the fact. It is true that in this case no shipper was involved, but this was because the case, as presented to the Commission, did not affect any interest of any shipper or receiver of freight. It was entirely a dispute between railroads, and no shipper had any knowledge or notice that any question of rates and routes was involved. There was, therefore, no reason why any "shipper or community" should express any concern. The record does show, however, as we have heretofore said, that in the interval between the first and second hearings in this case, certain of the Railroad Defendants attempted to cancel some of the joint "reshipping" rates here involved; that this proposed action was protested by shipping interests at Chicago and Peoria; and that upon hearing the proposed cancellation was voluntarily withdrawn (R. 167). Obviously, the proposed cancellation of these rates would not have been opposed had not the protestant shipping interests been interested in the maintenance of appellant's route from Peoria-Pekin to the east.

In addition, the record shows that the interest of some of the Railroad Defendants requires the continuance of appellant's route on this traffic. Those eastern lines having their own rails from Peoria-Pekin to the east and wishing to handle all the traffic, doubtless desire that appellant be eliminated from the route. Eastern lines such as the Michigan Central Railroad, Pere Marquette Railroad and Grand Trunk Railroad, however, can only participate in traffic under the joint "reshipping" rates by receiving that traffic from railroads which do reach Peoria-Pekin, and are thus only permitted to participate in the business because of the participation therein of roads, such as appellant, which reach Peoria-Pekin but do not have their own rails to the east (R. 162). One witness for the Railroad Defendants testified in this case that his railroad does not have a line to Peoria; that the only way in which it can participate in traffic to and from that point is by getting it from a connecting line, and that he conceded the right of appellant to participate in traffic under the joint "reshipping" rates for the purpose of hauling that traffic to the connection between his road and the line of appellant (R. 140).

From the foregoing, it is obvious that the Commission, in reaching the conclusion that it did with respect to the divisions of the joint "reshipping" rates has not only disregarded its duties and obligations under Section 15 (6) of the Act, but has also disregarded the evidence of record, and its own decisions.

E. *The findings made by the Commission and upon which its conclusion with respect to the divisions of the joint "reshipping" rates was apparently based, are not supported by any evidence in the record of the proceedings before the Commission.*

In the report on rehearing it is said (R. 47):

"The transportation services performed by de-

> fendants east of Chicago on all of such shipments are the same, and this record refers to no transportation reason for requiring defendants to accept less or different revenue on one than on the other."

This statement sets up a false standard for fixing divisions and is not in accordance with the record. The Railroad Defendants should accept less on traffic from Peoria-Pekin to the east than from Chicago to the same destination because the distances are greater from Peoria-Pekin and because the revenue must be divided with additional carriers. The joint "reshipping" rates are either the same from both points or not sufficiently higher in the case of traffic from Peoria-Pekin to give every railroad what it thinks it should have. This fact is controlling, since in dividing revenue under joint rates only that revenue can be divided which is actually collected.

It is not unusual for a railroad to perform the same service on two separate shipments and yet receive less revenue on one than on the other. This results from variations in rates as related to volume of service. Thus, for example, on grape-fruit from Texas to Chicago, appellant receives 38 cents per hundred pounds for its haul from Kansas City to Chicago, but on grape-fruit from California to Chicago it gets 25.5 cents per hundred pounds for precisely the same service performed over the same track. The division on the Texas traffic was fixed by the Commission and the division on the California traffic has been approved by an Examiner for the Commission (R. 169).

And if the Railroad Defendants, in the division of the joint "reshipping" rates, performed an identical service from Chicago and from Peoria-Pekin for varying revenue, they would be in precisely the same position as appellant has been placed. At the present time, on some

of the reshipped traffic from Peoria-Pekin, appellant receives nothing; on some it receives ½ cent a hundred pounds and on some it receives 2 cents per hundred pounds. On all of the traffic moving under the joint "local" rates it receives substantially greater earnings than on any of the traffic moving under the joint "reshipping" rates. Despite these varying returns, the service performed by appellant on all of the traffic is identical.

In fact Exhibit 15 before the Commission (certified to this court, R. 90) shows that in most instances, a carload from Peoria-Pekin to the east is composed partly of commodities moving under the joint "local" rates and partly of commodities moving under the joint "reshipping" rates. On these carloads, appellant receives a different return for each part of the carload, although its service on the entire carload is necessarily the same. A Railroad Defendant handling such a carload is, of course, in the same situation.

Even in deciding this case, the Commission ignored the matter of the varying revenue of appellant, for it substantially increased appellant's division of the joint "local" rates, while approving the divisions of the joint "reshipping" rates. Appellant's service is the same under both rates, and as we have said, both rates frequently apply to different parts of the same carload.

The fact is that in the division of the "local" rates both appellant and the Railroad Defendants are satisfied. Each gets what it thinks it ought to have because there is sufficient total revenue. Under the "reshipping" rates, however, the total revenue is apparently insufficient to give every road as much as it wants, and therefore both should take less than they get on the local shipments, even though the service performed by

both is the same on both classes of traffic. This results from the insufficiency of the rate, a matter not in issue in the proceeding before the Commission.

Continuing along the same line, the Commission said (R. 47):

> "Neither does the record disclose any substantial differences in the line-haul services of the western carriers, including the Alton, on any of this traffic, but if there were such differences and those differences should warrant greater revenue to the Alton on shipments accorded transit at Peoria than it is now receiving, such increase in revenue to it, it would seem, should come from the portion of the through rate accruing to the western lines and not from the portion now retained by the lines east of Chicago."

This court should understand that what the Commission here suggested is that appellant should get from a railroad handling traffic into Peoria-Pekin, part of the revenue collected by that railroad, although appellant is not a party to the rate and performs no transportation service under it. As suggested by Commissioner Eastman in his dissenting opinion (R. 49), it is not clear to us just how this could be done. So far as this case is concerned, the only rates participated in by appellant are the joint "reshipping" rates from Peoria to the east, and the only service performed by appellant is performed under those rates. It seems quite obvious that any revenue that it might receive must come from those rates, and this fact was admitted by witnesses who testified in the hearings before the Commission (R. 136, 143, 144).

In its report on rehearing, the Commission also said (R. 47, 48):

> "On most of the traffic here considered the route employed by the Alton is circuitous. The proportional rates from Peoria apply in connection with

> the Alton, not only via Chicago, Joliet and Dwight, but also via junctions south of Dwight, such as Chenoa, Ill., to which the haul of the Alton is considerably shorter than to Dwight, and it is not necessary for this traffic after it reaches the Alton to move via its northern junctions. All of this traffic may now move through Ashland and Springfield, Ill., in connection with the Baltimore & Ohio."

This statement of the Commission with respect to the circuity of appellant's route is not supported by the evidence of record. Exhibits 13, 14 and 16 before the Commission (all certified to this court; R. 89, 92) state the routes traversed by over 6,500 cars moving under the joint "reshipping" rates from Peoria-Pekin over the line of appellant, show these routes in map form and state the actual mileages from Peoria-Pekin to eastern destinations. These exhibits show that from Peoria-Pekin to eastern destinations the line of appellant, in combination with the lines of the Railroad Defendants, forms one of the shortest available routes.

What the Commission doubtless had in mind was that the routes from some points west of Peoria-Pekin, via Peoria-Pekin to the east, were longer than the routes from those same points via Chicago to the same eastern destinations. This is true in the case of some traffic, principally that which originates in the northwest, but these routes are maintained because of the desire of all railroads to continue Peoria as a transit point upon equalized rates. This was the thought of the Railroad Defendants, for on rehearing one of their witnesses, after complaining of appellant's participation in the joint rates from Peoria-Pekin to the east, said (R. 160):

> "My statement boils down to a complaint against the publication of transit rates via Peoria via those railroads. The rates, however, are published that way. The rates here involved are in effect from Peoria to New York with transit at Peoria, but if the

> Peoria combination had not been revised so as to be the same are the Chicago combination, the Alton would be out of the business unless it became a party to the rates of the western lines to Chicago via Peoria. The Alton gets in on the business because of the rate equalization."

These matters, we submit, are not of any importance in determining the circuity or noncircuity of appellant's route from Peoria-Pekin to the east under the joint rates here in issue. But even on the theory of circuity apparently adopted by the Commission, that body has fallen into error. Peoria-Pekin is directly intermediate between such points as Kansas City and St. Joseph, Missouri, and Buffalo, New York. Exhibit 14 before the Commission (R. 89) shows that there could scarcely be a shorter and more direct route between Kansas City, which is a large grain storage point, and Buffalo than through Peoria. Yet on traffic handled over this direct route via the Santa Fe to Pekin, the Alton to Joliet, and the Michigan Central to Buffalo, the revenue to appellant approved by the Commission and received by it out of the joint rate from Peoria to Buffalo, is 2 cents per hundred pounds, an amount insufficient to even pay switching absorptions.

As suggested by Commissioner Eastman in his dissent to the second report of the Commission (R. 49, 50), the remedy for the circuity said by the Commission to exist, lies in the cancellation of rates and routes via Peoria, a matter not involved in this proceeding and which the Commission has sought to produce only by indirection. Certainly, so long as the joint rates from Peoria-Pekin are maintained as they now exist and appellant participates in them over direct routes, appellant's right to a fair share of the total revenue received cannot be denied on the ground of circuity.

The Commission's idea of a noncircuitous movement

is apparently represented by its statement (R. 48) that appellant should move the traffic from Peoria-Pekin to the east via Ashland and Springfield, Illinois. This could be done, of course, but it would substantialy lengthen the haul from Peoria-Pekin to Buffalo and New England points. As appears from Exhibit 14 before the Commission (R. 89), Ashland and Springfield are south and west of Peoria-Pekin. The Commission's suggestion, therefore, is that present circuity of route be avoided by starting a shipment in a direction opposite to that in which it should go to reach its ultimate destination.

F. *Since the Commission's order with respect to the divisions of the "reshipping" rates went beyond the issues, was unsupported by evidence, exceeded constitutional limits and was unreasonable and arbitrary, it will be enjoined.*

From a reading of its second report, it is obvious that the Commission, in deciding this case on rehearing, did not confine itself to the issues presented to it. One issue was the propriety of the divisions of the joint "reshipping" rates from Peoria-Pekin to the east published by appellant and the Railroad Defendants. In dealing with this issue, the Commission considered the application of different rates to Peoria-Pekin and Chicago from western points; transit at Peoria-Pekin; routes from western territory via Peoria-Pekin and Chicago to eastern destinations and a variety of other matters having nothing to do with divisions. Certainly, it did not confine itself to the determination of proper divisions of the joint rates involved, after a consideration of the matters enumerated in Section 15 (6) of the Act.

When this case was called for hearing before the Commission, no one could have presumed that the Commission intended to consider questions of rate application,

routes and transit. No evidence was presented on these matters except statements of the existing situation. Numerous parties who might conceivably have an interest in such issues were not parties to the proceeding and were not heard. It is also obvious that the Commission's conclusion with respect to the divisions of the "reshipping" rates was unsupported by evidence and was unreasonable and arbitrary.

Under these circumstances, its order in that respect must be condemned upon the merits. It is elementary that a hearing must be limited to the issue formed by the pleadings. *Oregon R. R. & N. Co.* v. *Fairchild,* 224 U. S. 510, 525, 526; *Southern Pacific Co.* v. *Bartine,* 1 Fed. (2d), 323, 324, 325. It is also certain that an order made without a hearing, unsupported by evidence, and which exceeds constitutional limits and is unreasonable and arbitrary will be enjoined. *Manufacturers Railway Co.* v. *United States, supra,* p. 481; *Assigned Car Cases,* 274 U. S. 564; *Virginian Ry. Co.* v. *United States,* 272 U. S. 658; *Western Chemical Co.* v. *United States,* 271 U. S. 268; *United States* v. *New River Co., supra; B. S. L. & W. R. Co.* v. *United States, supra; United States* v. *B. & O. R. R. Co.,* 225 U. S. 306.

Conclusion.

Under the foregoing, we submit that the order of the Commission assailed in this case, in so far as it approves and authorizes the application of the present divisions of the joint "reshipping" rates here involved, should have been set aside and that the Railroad Defendants should have been enjoined from enforcing those divisions against appellant. As we have said, we have been unable to find anything in the decisions of this court which supports the theory that the court does not have

jurisdiction because of the alleged "negative" form of the Commission's order. Not only does it seem to us that this theory fails of support in the decisions of this court, but that this must be so under every consideration of justice and equity.

It is inconceivable that a conceded violation of statutory and constitutional rights can be inaugurated and remain in effect merely because of the form of words in which it is couched. Yet that is the effect produced by the decision of the lower court. Appellant, under the conditions produced by the Commission's order and continued by the lower court, may only avoid a violation of its rights by withdrawing from the traffic. It is thus compelled to preserve one right by foregoing another. We submit that such a conclusion is not supported by any decision of this court.

And on the merits it is equally plain that appellant is entitled to the relief prayed for by it. The Commission's order, in so far as it is complained of, is arbitrary and unreasonable on its face. It is not based upon any evidence of record. In entering it, the Commission refused to comply with the law as construed by this court. It went beyond its jurisdiction by basing its decision upon a consideration of matters not in issue and concerning which there had been no hearing and no evidence. Under these circumstances its order, so far as the merits are concerned, is necessarily bad.

We submit that the decision of the lower court should be reversed.

Respectfully submitted,

SILAS H. STRAWN,
FRANK H. TOWNER,
Solicitors for Appellant.

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Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 81

THE ALTON RAILROAD COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
Appellees.

REPLY BRIEF ON BEHALF OF APPELLANT.

SILAS H. STRAWN,
FRANK H. TOWNER,
Solicitors for Appellant.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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REPLY BRIEF ON BEHALF OF APPELLANT.

MAY IT PLEASE THE COURT.

We have been served in this case with a brief on behalf of appellees, United States and Interstate Commerce Commission. The appellee railroad companies have apparently filed no brief. We wish to submit a short reply to the brief on behalf of the United States and the Commission, calling attention to a few of the errors in fact and law that it contains.

1. The Facts.

On page 9 of appellees' brief it is said:

> "These rates * * * were voluntarily established by the carriers themselves."

The same statement is made at page 26. The majority report of Division 5 (R. 33) is cited as authority for this statement. The report in question does not so state. It is said:

> "There is no showing that any of these rates, from Peoria and Pekin to eastern destinations, were established pursuant to a finding or order of the Commission under Section 15 (1) or (3)."

There is nothing in the evidence or reports of the Commission which supports the statement that the non-transit rates were voluntarily established by the carrier.

On page 10 of appellees' brief, it is said that when the eastern lines receive the traffic at Chicago from any line other than that of appellant, they receive the full amount of the "reshipping" rate from Chicago to the east. The same statement is made at the top of page 55 of that brief. Both statements are in error. The record before the Commission shows (R. 167, 168) that on traffic moving under the "reshipping" rates from East St. Louis to eastern territory, via Chicago, the lines between East St. Louis and Chicago receive 23 per cent and lines east of Chicago 67 per cent of the rates.

Out of the "reshipping" rate of 34.5 cents per hundred pounds from St. Louis and East St. Louis to New York, the St. Louis-Chicago lines, including appellant, thus receive 7.9 cents per hundred pounds, while the lines from Chicago to the east receive 26.6 cents per hundred pounds, or 3.9 cents per hundred pounds less than their "reshipping" rate of 30.5 cents per hundred pounds from Chicago to the east. The record contains no justifi-

cation for the different treatment given the lines hauling the traffic from Peoria-Pekin to Chicago.

2. The Jurisdictional Question.

In discussing the question of a court's jurisdiction under the bill in this case, appellees' brief cites no cases other than those cited in our main brief. It is only said that those cases in which jurisdiction was refused govern the case at bar and that those cases in which jurisdiction was taken have no application. Some statements are made, however, which are not supported by the cases cited.

Thus, in discussing the *Manufacturers Railway Company Case,* 246 U. S. 457, it is said, at page 31 of appellees' brief, that that case controls this one because here appellant asked the Commission to exercise its administrative function by fixing new divisions, but the Commission refused to do so. The argument overlooks the fact that in the *Manufacturers Railway Case,* the Commission permitted the payment of stated amounts to the Manufacturers Railway, and the court was asked to substitute other amounts therefor. In this case there is no request by appellant that the court fix any amounts to be received by appellant. The argument also overlooks and ignores the present statutory duty of the Commission to fix reasonable and just divisions.

In discussing the *New River Company Case,* 265 U. S. 533, it is said at page 33 of appellees' brief that the order in the case at bar is negative both in form and substance because it made no change in the existing status. This was also true in the *New River Case,* for there also, the only order made by the Commission did not require any change in the then existing status, since it only dismissed the complaint of the parties who afterwards appealed to the courts.

At page 34 of appellees' brief it is said that an injunction restraining the Railroad Defendants from applying the present divisions would not restore any previously existing divisions. But this fact does not control, for as pointed out in our main brief (pp. 44, 45), this was true in a number of cases in which this court assumed jurisdiction, and would also have been true had the Commission entered an order requiring in terms that the present divisions be maintained and had that order been set aside.

On page 34 of the brief, it is indicated that the case at bar not only,—

> "urges that the divisions that the Commission has declined to change are unjust and unreasonable, but invites the court to exercise administrative functions * * *."

This is incorrect. We do contend that the divisions of the "reshipping" rates approved by the Commission are unjust and unreasonable on their face, but we also contend that they violate appellant's constitutional rights and thus run counter to the rule laid down by this court in *United States* v. *A. & S. Ry. Co.*, 265 U. S. 274, that divisions must be high enough to avoid a confiscatory result. But we do not ask the court to exercise any administrative function. It is not asked to consider the evidence and say what divisions are proper. We only ask that our statutory and constitutional rights be protected and certainly a court has power and jurisdiction to do this in a proper case.

We wish to make it plain that we do not deny the primary jurisdiction of the Commission to fix divisions of joint rates. We do maintain, however, that this power of the Commission is not so final and conclusive that it can be successfully used as a justification for what is on its face an unjust and unreasonable action, producing a violation of statutory and constitutional law.

3. The Merits.

In discussing the merits of this case, a number of erroneous conclusions are reached in appellees' brief. On page 40 of that brief it is said that it is evident from the report of the Commission on rehearing that appellant did not urge increased divisions on the ground that it was in weak financial condition. There is no support in the record for this statement. It is obvious from the first report of the Commission that the financial status of appellant was urged upon the Commission (R. 30). The fact that the ownership of appellant's stock had changed hands between the first and second hearings before the Commission (R. 42) would not, in itself, operate to improve its financial condition, and there is no evidence of record that it did so. Appellees' brief cites no authority for the statement made.

On page 41 of appellees' brief, it is said that there are junctions other than Dwight, Joliet and Chicago via which the "reshipped" traffic can move over the Alton and via which the routes are as short, if not shorter. This statement is contrary to the record. As we pointed out in our main brief (pp. 67, 68, 69), the other junctions referred to are south and west of Peoria-Pekin and moving traffic via those junctions to eastern points would increase the mileage, as the traffic would move initially in a direction opposite to that in which it should go to reach its destination.

On pages 41 and 42 of appellees' brief, it is pointed out that there are other railroads which can handle the traffic now handled by appellant under the "reshipping" rates in issue. The argument made resolves into the conclusion that because these other lines can furnish transportation between Peoria-Pekin and the eastern points, appellant should not be permitted to furnish it. Under

this theory, all Peoria-Chicago lines should be prevented from handling the traffic, as should also those eastern lines which do not have rails to Peoria-Pekin. Yet those eastern lines desire to participate in the traffic (R. 109) and admit the right of appellant to participate in it (R. 140).

Followed to its logical conclusion, appellees' theory would eliminate all competition between carriers. Based on it, we might say with equal propriety that since appellant has a perfectly good railroad between Peoria-Pekin and Chicago, all other railroad companies should discontinue their service between those points. And if those companies having their own rails from Peoria-Pekin to the east do not wish to participate with appellant in the publication of the joint rates here involved, their remedy is to cancel the rates. They cannot leave the rates in effect and secure the benefit of not having them in effect.

On page 44 of appellees' brief, it is said that if on traffic from Kansas City to Chicago,—

> "the Alton should have greater revenue on the shipment accorded transit than on the direct shipment, * * *, then the additional revenue should come from a separate charge for the transit rather than out of the eastern lines' revenue."

Certainly, appellant is entitled to greater total revenue on a shipment from Kansas City to Peoria and one from Peoria to Chicago, than on a through shipment from Kansas City to Chicago. The record definitely shows the greater service in the one case than in the other (R. 165, 166, 171), and the Commission has held that such additional service justifies higher divisions. *Waverly Oil Works* v. *Penna. R. Co.*, 28 I. C. C. 621; *Minnesota Western R. Co.* v. *A. T. & S. F. R. Co.*, 109 I. C. C. 127.

The suggestion that the additional revenue to which

appellant is thus entitled should come out of a separate charge for the transit service, imports into this case an issue not involved in the proceedings before the Commission and which the Commission did not suggest. It is indicative of the manner in which a majority of the Commission disposed of this case and of the grounds upon which the order on rehearing was based. We fail to see how a claim for higher divisions of a joint rate is met by a statement that the increased revenue sought should be secured by imposing a separate charge upon a different service which was not in issue and concerning which there was no evidence.

At the bottom of page 46 and the top of page 47 of appellees' brief, it is said that appellant did not ask the Commission to increase the divisions accorded to other lines hauling traffic to Chicago under the joint "reshipping" rates, but asked that appellant be given a special concession when it handled the traffic. This is incorrect. True, appellant did not ask for an increase in the divisions of other lines for obvious reasons, but certainly it has not requested that it be given any special concession. The argument seems to lead to the conclusion that because other railroads are satisfied with divisions which are concededly inadequate and insufficient, appellant should also be satisfied.

On page 47 of appellees' brief it is also said that the divisions of the joint "reshipping" rates may not be considered by themselves but must be considered in the light of the fact that the rates apply on shipments to and from a transit point. The report of the Commission on rehearing is cited in support of this assertion. We fail to follow this reasoning of the brief for the same reason that we have been unable to follow the reasoning of a majority of the Commission as contained in its final report in this proceeding. We reiterate that the only joint

rates to which appellant was a party, applied from Peoria-Pekin to the east and that these were the only rates a division of which was sought. The character of traffic upon which these rates applied and the manner of their application obviously can have no bearing upon the just distribution of the revenue accruing from them.

On page 48 of appellees' brief, it is said that the Commission found that the routes over which shipments would move from northwestern territory, via Peoria and Chicago over the Alton to the east, was circuitous. True, the Commission did so find, and it is also true that such a route is longer than the direct route from northwestern territory to the east via Chicago. But as we have pointed out in our main brief (pp. 67, 68), the routes via Peoria and Chicago are maintained voluntarily by the carriers for competitive and other reasons, and the propriety of those routes was not an issue before the Commission. And the election of the carriers as a whole to maintain rates over such routes certainly has no bearing on the proper division of the "reshipping" rates from Peoria-Pekin to the east.

At the top of page 49 of appellees' brief it is said that,—

> "The Commission declined to grant the Alton a division which would enable it to participate in this traffic via its northern junctions."

This is correct, as we have pointed out in our main brief (pp. 57-59). There is no claim in appellees' brief that the result sought to be produced by the Commission was justified by any evidence of record, or that the continued handling by appellant of traffic under the joint "reshipping" rates was an issue in the case. The language, in effect, concedes that although rates and routes were not in issue and there was no evidence concerning them, the Commission's order relates entirely thereto. It con-

cedes that the Commission has said to appellant, in effect, that although the Railroad Defendants are willing to continue the publication of the "reshipping" rates via appellant's line, appellant should still be prevented from participating in traffic under those rates. It is difficult to see how such a decision can be sustained on the merits.

At the bottom of page 49 of appellees' brief it is said:

> "Interchange of the traffic between the Alton and the eastern lines at junctions south of Chicago, Joliet, and Dwight will obviously tend to reduce the circuity of the route."

No reference is made to any evidence of record supporting this statement and, as we have heretofore pointed out, it is contrary to the evidence which is of record.

At the top of page 50, it is said:

> "The Commission did not hold that the Alton must participate in this traffic via its northern junctions at a zero division, but on the contrary it declined to grant the Alton a division which would enable it to participate in the traffic via those particular junctions."

True, the Commission did not by order require appellant to continue its handling of traffic under the joint "reshipping" rates. But that obligation rests upon appellant so long as the rates are in effect, as they now are and have been for years past. Appellant can only escape the burden laid upon it under the Commission's order by canceling its participation in the rates before it is properly determined that it should do so, thus foregoing one right in order to preserve another. We submit that the law does not require this.

On pages 54 and 55 of appellees' brief, it is argued that there is no confiscation of appellant's property under the Commission's order, since appellant has the right to cancel its participation in the joint "reshipping"

rates. Such an argument defeats itself. First, as we have pointed out, appellant is not compelled to preserve its constitutional rights by foregoing other rights to which it is equally entitled. Second, the right of appellant to cancel its participation in the joint "reshipping" rates is not clear and certain. It could only do so by tariff publication, and the Commission has jurisdiction to suspend such a tariff for seven months pending hearing. (Section 15 (7), Interstate Commerce Act, U. S. C. A., Title 49, Sections 1 to 15a, page 433). Upon such a hearing, with all interested parties present, the facts might be such that the Commission would decline to permit appellant to cancel the rates. In view of its decision in the case at bar, the Commission might not do these things, but it cannot be assumed that it would not do them. Appellant does not, therefore, have an absolute right to withdraw from the handling of the traffic and thus avoid confiscation of the property to which it is now subjected.

The argument that a confiscation of property is not a confiscation if it can be avoided by a withdrawal from the activity in connection with which the confiscation exists is new. Under it, a claim of confiscation as a result of a tax on property or occupation could be met by the claim that since the property could be sold or the occupation discontinued, the confiscation is not a confiscation. We submit that this is certainly not the law. So long as the joint "reshipping" rates here involved are in effect, we submit that appellant has a legal right to engage in transportation under them and cannot be compelled to forego that right without hearing in order to escape a confiscation of its property.

We do not contend that independently of the publication of the rates themselves, appellant has a vested right to participate in transportation under them, to haul traf-

fic to certain junctions, and to receive a compensatory division of those rates in all events. What we do say is that the right of appellant to participate in the traffic, to haul that traffic via certain junctions, and to receive a fair division of the rates, is fixed and determined by the publication of those rates by appellant and the Railroad Defendants, and that these rights cannot be questioned in this proceeding. Appellant's right to become a party to these rates, if it was not now a party, is not the issue.

We submit that upon the law and the facts the judgment of the lower court should be reversed.

Respectfully submitted,

SILAS H. STRAWN,
FRANK H. TOWNER,
Solicitors for Appellant.

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No. 81

In the Supreme Court of the United States

OCTOBER TERM, 1932

THE ALTON RAILROAD COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, BALTIMORE & OHIO RAILROAD COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the District Court (R. 177) is reported at 58 F. (2d) 399. The original report of the Commission, Division 5 (R. 22), is reported at 169 I. C. C. 594. The report of the Commission on rehearing (R. 41) is reported at 179 I. C. C. 517.

QUESTIONS PRESENTED

1. Whether the Commission's negative order, merely denying the affirmative relief sought by ap-

pellant in respect of the divisions of certain joint rates, was one which the District Court had jurisdiction to review.

2. Whether, if the District Court had jurisdiction, appellant's petition should be dismissed for want of equity.

STATUTE INVOLVED

The Interstate Commerce Act provides:

> SECTION 1 (4). *Duty to furnish transportation and establish through routes; division of joint rates.*—It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.
>
> SECTION 15 (6). *Commission to establish just divisions of joint rates, fares, or charges; adjustments.*—Whenever, after full hearing

upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used

in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge. (C. 91, 41 Stat. 456, 475, 486, U. S. Code, title 49, sec. 1 (4) and sec. 15 (6).)

STATEMENT

This in an appeal from a final decree (R. 184) of the specially constituted District Court dismissing, for want of jurisdiction, the petition of the appellant which alleged that it was brought "for the purpose of enjoining, setting aside, annulling, and suspending part of a certain order" (R. 1) of the Interstate Commerce Commission, but which actually did not seek to set aside any part of the order, and in substance merely asked the court to grant the administrative relief which the Commission had denied.

Proceedings before the Commission

The proceeding before the Commission was initiated by the filing of a complaint by the receivers of the Chicago & Alton Railroad Company (R. 13) which alleged that the divisions accorded to them

by the eastern carriers out of the joint proportional or reshipping (transit) rates and out of the joint nontransit rates on grain, grain products, and grain by-products from Peoria and Pekin, Ill., to points in New England and in Eastern Trunk Line territory (east of Buffalo, Pittsburgh, and Wheeling), on traffic over the Chicago & Alton from Peoria and Pekin and interchanged with the eastern carriers at Chicago, Joliet, or Dwight, Ill., were unjust, unreasonable, inequitable, and unduly prejudicial to complainants, in violation of section 1 (4) of the Interstate Commerce Act. It was also alleged that these divisions were in violation of section 208 (b) of Transportation Act, 1920, on the ground that they constituted changes in the divisions which were in effect February 29, 1920, made by the eastern carriers without agreement with the Alton, over its protest, and without requirement by any state or Federal authority. The prayers were for reasonable and just divisions of said joint rates and for reparation.

Hearing was held upon the complaint, at which a large volume of evidence was introduced, including many documentary exhibits. Subsequently, rehearing was held and additional evidence taken. The evidence established the facts hereinafter stated and found by the Commission.

During the interval between the first and second hearings the appellant, Alton Railroad Company,

was formed and acquired the properties of the Chicago & Alton at a foreclosure sale, the receivers being discharged (R. 153, 173), and thereafter the Baltimore & Ohio Railroad Company acquired control of the Alton Railroad Company by purchase of capital stock (R. 42, 173). Both of these acquisitions were approved by the Commission in *Alton R. Co. Acquisition and Stock Issue,* 175 I. C. C. 301. Hereinafter the Chicago & Alton, the receivers thereof, and the Alton Railroad Co. will be referred to as the Alton.

The distance between Peoria and Pekin is less than 10 miles, and the inbound and outbound rates to and from these points and the transit regulations and practices in effect there are generally the same. (R. 24.) Peoria will therefore be referred to as embracing both Peoria and Pekin.

The reshipping or proportional rates from Peoria are actually "transit" rates, applying only where there has been a previous rail movement into Peoria from certain defined territories of origin, where the billing covering the inbound movement into Peoria is surrendered at the time of the outbound movement, where the outbound movement takes place within twelve months after the inbound movement, and where various rules and regulations governing the transit privilege at Peoria, published and filed with the Commission, are otherwise complied with. (R. 24, 28, 45–46, 86, 88.) If the outbound rate is changed during the transit period of

twelve months, the outbound rate in effect at the time of the inbound movement is the lawfully applicable rate. (R. 46.) The outbound shipments from Peoria which move on the transit rates are of commodities agreed to be the same as, or the products of, or the by-products from, some prior shipment which has moved into Peoria. (R. 24.)

The nontransit rates from Peoria apply on shipments which originate locally at Peoria and also on shipments which originated beyond but which are not entitled to the transit rates. (R. 24, 31, 46, 88.)

Most of the outbound traffic from Peoria here involved consists of grain products or commodities taking grain-products rates. The rates on grain products will be referred to herein as typical; New York, N. Y., will be referred to as a typical destination, and all rates and divisions will be stated in amounts per 100 pounds.

The nontransit rates are constructed by adding a specific or arbitrary amount to the Chicago reshipping rate. (R. 32.) The reshipping rate from Chicago to New York, N. Y., on grain products is 30.5 cents. (R. 88.) The specific or arbitrary is 11.5 cents, resulting in a rate of 42 cents (nontransit) from Peoria to New York. (R. 32.)

The nontransit rates were divided as between the Alton, on the one hand, and the eastern lines on the other, when the traffic moved through the aforesaid northern junctions, that is, over the Alton from Peoria to Chicago, Joliet, or Dwight, and

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thence over some eastern line or lines to destination, as follows: 20 per cent of the rate to the Alton and the balance to the eastern lines. (R. 31.) Under this basis of divisions the Alton received 8.4 cents out of the typical rate of 42 cents on grain products from Chicago to New York, and the eastern lines received the balance of 33.6 cents. (R. 176.)

The Commission, Division 5, in its report of November 28, 1930, found that this basis of divisions was unreasonable and that the nontransit rates should be divided by allowing the Alton a division equal to the arbitrary or specific from Peoria to Chicago, with the balance, equal to the reshipping rate from Chicago to destination, to the lines east of Chicago. (R. 33.) This had the effect of increasing the Alton's division of the aforesaid 42-cent rate from 8.4 cents to 11.5 cents and reducing the division of the eastern lines from 33.6 cents to 30.5 cents. (R. 176.)

Upon rehearing, the eastern lines did not challenge this finding of Division 5, and the Commission affirmed it. (R. 42, 48.)

The transit rates from Peoria, which are substantially lower than the nontransit rates, are what are known as "varying proportional" rates; that is, from Peoria to a given destination in the eastern territory any one of four different rates might apply, depending upon the point of origin of the inbound shipment to Peoria. The transit

rates on grain products from Peoria to New York are as follows:

On shipments originating in—	Rate
Illinois-Iowa territory	32.5
Northern Iowa territory	31.0
Northwestern territory	30.5
Trans-Mississippi territory	32.5

(These territories are described below.[1])

These rates were not prescribed by the Commission, nor were the nontransit rates in question, but were voluntarily established by the carriers themselves. (R. 33.)

With the exception of certain points in Illinois, the carriers do not maintain single-factor joint rates from the western grain-producing regions to the eastern destination territory and the traffic moves at through rates made by combining inbound and outbound rates to and from the several gateways, particularly Chicago, Peoria, and St. Louis. (R. 25, 48.) The through rates through the several gateways are equalized, but the factors making up the through rates are not equal. From Trans-Mississippi and Illinois-Iowa territories the

[1] Illinois-Iowa territory embraces the State of Illinois and points on the west bank of the Mississippi River opposite Illinois. Northern Iowa territory embraces that part of the State of Iowa that lies north of the Chicago-Council Bluffs line of the Chicago & North Western Ry. Co. Northwestern territory embraces North Dakota, South Dakota, Minnesota, the western portion of Wisconsin, certain portions of Canada, and Washington, Oregon, and Idaho. Trans-Mississippi River territory embraces all the territory west of the Mississippi River not included in the other three territories, except California, Arizona, and Nevada. (R. 87, 90; Ex. 14, map.)

inbound rates to Peoria are 2 cents lower than to Chicago and correspondingly the outbound rates from Peoria, on traffic originating in those territories, are 2 cents higher than the outbound rates from Chicago. From Northern Iowa territory this difference as between the inbound and outbound rates to and from Chicago and Peoria, respectively, is 0.5 cent, while from Northwestern territory the respective inbound and outbound rates are the same.

There are numerous carriers whose lines reach and serve the western-producing regions and which run directly to Chicago. When the eastern lines receive the traffic from any of these direct carriers, they collect and retain their reshipping or proportional rate applicable from Chicago to destination. This rate does not vary dependent upon the territory of origin. The reshipping or proportional rate from Chicago to New York on grain products is 30.5 cents upon traffic originating in any of the four origin territories. The line of the Alton extends from the Peoria gateway to the Chicago gateway. It follows that if the eastern lines should accord the Alton a division of the rate from Peoria to destination via Chicago greater than the difference between the rates from Chicago and Peoria to destination, the eastern lines would be forced to accept less than their Chicago reshipping rate when the traffic is received by them from the Alton, although they do receive the full amount of that rate when the traffic comes to them from any

other western carrier. The eastern lines were unwilling thus to shrink their revenues in order to enable the Alton to participate in the traffic via this particular gateway,[2] and consequently the Alton was forced to accept as its divisions of the Peoria varying proportional rates the amount, if any, by which those rates exceeded the Chicago proportional rates, viz, 2 cents on traffic originating in Illinois-Iowa and Trans-Mississippi territories, .5 cents on traffic originating in Northern Iowa territory, and nothing on traffic originating in Northwestern territory.

Division 5 of the Commission found these divisions unreasonable and ordered them increased so that the Alton would receive 20 per cent of the rate. (R. 31.) This increased the Alton's divisions of the typical Peoria-New York grain-products rates to amounts ranging from 6.1 cents to 6.5 cents and reduced the divisions of the eastern carriers from 30.5 cents to amounts ranging from 24.4 cents to 26 cents.

Upon rehearing and after full consideration of all the facts, including evidence respecting the matters required to be considered by section 15 (6) of the Act, the Commission reversed this finding of Division 5, and concluded that the Alton was not entitled to increased divisions of these rates.

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[2] What is said herein respecting Chicago is also true of Joliet and Dwight. They are "Chicago rate points," taking the same inbound and outbound rates as Chicago.

In its report on rehearing the Commission, after stating the claim of the eastern lines that they are entitled to retain their 30.5-cent proportional rate east of Chicago, whether the traffic comes from connections after receiving transit at Chicago or any point intermediate thereto or in through continuous movement, pointed out that—

> The line-haul revenue which accrues to the western lines is now the same in all instances, and the Alton does not question the division of the through revenue east and west of Chicago on traffic accorded transit at that point, or on traffic in through continuous movement and which is not stopped for transit. It would thus make a distinction between the shipments accorded transit at Peoria and the other two classes of shipments. On the continuous movement, or on shipments accorded transit at Chicago, it would accord to the eastern lines their full proportional rate beyond Chicago, but on shipments accorded transit at Peoria it would divide the reshipping rate beyond Peoria so as to accord to the eastern lines less revenue and to the western lines greater revenue than they receive on the other two classes of shipments. (R. 44)

The Commission found that to accord a division to the Alton or any other line hauling the traffic from Peoria to Chicago greater than the difference between the rates to and from Peoria and Chicago would result in according to the Alton or other carrier west of Chicago a greater proportion of

the revenue than such carriers now receive on the direct movement to Chicago:

> Since the difference between the inbound rates and the outbound rates from and to Peoria on the one hand and Chicago on the other is in each instance the same, as it must be if the present equalization is to be maintained, to accord a division to the line handling the traffic from Peoria to Chicago greater than the difference between the rates to or from Peoria and Chicago would result, as previously indicated, in according to the carriers west of Chicago a greater proportion of the revenue on the through movement from point of initial shipment to final destination than such carriers now receive from the direct movement to Chicago. In other words, the Alton would receive greater revenue on a shipment from Kansas City, for example, to Chicago accorded transit at Peoria than it would on a like shipment moved direct to Chicago. Also the lines east of Chicago would then be forced to accept less revenue on a shipment accorded transit at Peoria than on a shipment originating at the same point and accorded transit at Chicago or any intermediate point other than Peoria west of Chicago. The transportation services performed by defendants east of Chicago on all of such shipments are the same, and this record refers to no transportation reason for requiring defendants to accept less or different revenue on one than on the other. (R. 47)

The eastern line defendants contended that the participation of the Alton in much of this traffic, particularly from the Northwest, coming to it at Peoria short hauls all carriers handling the inbound traffic to that point, except the Minneapolis & St. Louis, which is the only carrier serving Peoria and the Northwest which does not also serve Chicago, that the Alton is not necessary to the movement of any of this traffic, but that if it desires to continue therein and is not satisfied with its present earnings it should look to the inbound carriers to Peoria and not the carriers east of Chicago. In sustaining this contention the Commission said:

> Neither does the record disclose any substantial differences in the line-haul services of the western carriers, including the Alton, on any of this traffic, but if there were such differences and those differences should warrant greater revenue to the Alton on shipments accorded transit at Peoria than it is now receiving, such increase in revenue to it, it would seem, should come from the portion of the through rate accruing to the western lines and not from the portion now retained by the lines east of Chicago. (R. 47)

In finding that the transportation services of the Alton for the performance of which it sought increased divisions were not of importance to the public, the Commission stated:

> On most of the traffic here considered the route employed by the Alton is circuitous.

The proportional rates from Peoria apply in connection with the Alton, not only via Chicago, Joliet, and Dwight, but also via junctions south of Dwight, such as Chenoa, Ill., to which the haul of the Alton is considerably shorter than to Dwight, and it is not necessary for this traffic after it reaches the Alton to move via its northern junctions. All of this traffic may now move through Ashland and Springfield, Ill., in connection with the Baltimore & Ohio. Prior to the present rate equalization through the various gateways, by rates breaking thereon, the joint rates then in effect from the Northwest to eastern destinations did not apply via Peoria on traffic through Chicago. On grain and by-products from the Northwest the proportional rates from Peoria are now restricted so as not to apply via Chicago, and the same restriction could readily be made on grain products. These facts are important in our consideration of "the importance to the public of the transportation services" of the Alton for the performance of which it is here seeking increased divisions, an element which section 15 (6) of the act requires us to consider. No shipper or community has expressed any concern over the continuance of those transportation services by the Alton, and this record affords no support for a finding that they are important to the public.

The other matters which section 15 (6) requires us to consider in our determination of

> divisions of joint rates, facts with respect to which are of record and which we have considered in reaching our conclusions herein, are sufficiently recited in the original report. (R. 47–48)

Its ultimate findings were:

> We find that the assailed divisions of the reshipping or proportional rates have not been shown to be unjust, unreasonable, or otherwise unlawful as alleged, and the finding in the original report in that respect is reversed. The finding of division 5 in respect of the assailed divisions of the nontransit or local rates is affirmed. A modified order will issue. (R. 48)

The Commission did not disturb the earlier finding of Division 5 that the Commission has "no authority to enforce agreements respecting divisions or to enforce the requirements of section 208 (b) of the Transportation Act, 1920, * * *." (R. 33.) Nor did it disturb Division 5's denial of reparation to the Alton on the ground that it had no authority "to require a readjustment of the divisions of transit, or proportional, rates or of nontransit, or local, rates on the commodities; for there is no showing that any of these rates, from Peoria and Pekin to eastern destinations, were established pursuant to a finding or order of the Commission under section 15 (1) or (3). *Brimstone R. R. Co.* v. *United States,* 276 U. S. 104." (R. 33.)

The order of Division 5, issued November 28, 1930, which granted increased divisions to the Alton out of both the transit and nontransit rates, was by its terms effective March 10, 1931. Prior to its effective date the defendants petitioned the Commission for rehearing. By order dated March 9, 1931, the Commission granted that petition and indefinitely postponed the effective date of Division 5's order. That order never became effective.

The Commission's order of December 7, 1931 [3]

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[3] The body of the order (R. 55–56) reads as follows:

"This case having been reheard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report on rehearing containing its findings of fact and conclusions thereon, which said report, together with the original report and order herein, 169 I. C. C. 594, is hereby referred to and made a part hereof; and the commission having found in said report on rehearing, (1) that just, reasonable, and equitable divisions to be received, respectively, by complainants herein and the defendant carriers east of Chicago, Joliet, or Dwight, Ill., out of the joint nontransit rates on grain, grain products, and grain by-products, in carloads, from Peoria and Pekin, Ill., via Chicago, Joliet, or Dwight, to destinations in eastern trunk-line and New England territories, east of Buffalo, N. Y., over the lines of complainants to Chicago, Joliet, or Dwight, will be the specific or arbitrary over the Chicago reshipping rate to complainants and the reshipping rate from Chicago to destination to the carriers defendant east of Chicago; and (2) that the present divisions of joint reshipping or proportional rates on grain, grain products, and grain by-products, in carloads, from Peoria and Pekin over the lines of complainants to Chicago, Joliet, or Dwight, destined to points in eastern trunk-line and New England territories east of Buffalo, are not un-

(R. 50), after reciting the Commission's findings on rehearing, vacated and set aside the previous order of Division 5, and required that the defendants accord the Alton the increased divisions of the nontransit rates specified in the findings. The order contains no other requirement whatsoever.

Proceedings in Court below

Petition to set aside, enjoin, and restrain the Commission's order of December 7, 1931, "in so far as it is herein complained of as being illegal," was filed in the court below January 16, 1932. It named as defendants the United States and the Commission and certain of the eastern lines that had been defendants in the Commission proceeding. It prayed that the part of the Commission's order complained against be annulled and its enforcement enjoined, and also that the railroad defendants "be perpetually enjoined from enforcing or

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just, unreasonable, or otherwise unlawful as alleged by complainants:

"*It is ordered*, That the aforementioned original order of November 28, 1930, be, and it is hereby, vacated and set aside.

"*It is further ordered*, That the above-named defendants, according as they participate in the transportation, be, and they are hereby notified and required to cease and desist, on or before January 16, 1932, and thereafter to abstain from demanding, collecting, or receiving divisions of the joint nontransit rates specified in the preceding paragraph which do not allow said complainants the divisions found in said reports to be just, reasonable, and equitable.

"*And it is further ordered*, That this order shall continue in force until the further order of the commission."

applying as against petitioner the divisions of said joint transit rates approved, authorized, and required by said Commission in its said report and order of December 7, 1931." (R. 12.)

The petition also alleged (R. 9) that the divisions accorded the Alton by the defendant carriers were unlawful because changed subsequently to February 29, 1920, in alleged violation of Section 208 (b), Transportation Act, 1920, c. 91, 41 Stat. 456, 464, but at the hearing counsel for petitioner asserted that he did not ask an injunction under that section (R. 172).

Answers to the petition were filed by the United States (R. 56), by the Commission (R. 63), and by the railroad defendants (R. 73) each of which urged the lack of jurisdiction (R. 56–58; 72–73; 78–79). Hearing before three judges was had February 24, 1932 (R. 80), at which a certified copy of the record before the Commission was received in evidence as petitioner's Exhibit 1 (R. 80). A condensed statement of the oral testimony is reproduced in the transcript. (R. 81–172.) The exhibits received in evidence in the Commission proceeding, designated Exhibits 1 to 33, both inclusive, are not printed as part of the transcript but have been submitted to this court as original exhibits under stipulation of counsel (R. 193) and order of the District Court (R. 191).

April 7, 1932, the court rendered its opinion (R. 177–184) with which were its findings of fact (R. 173–176) and conclusions of law (R. 176–177). Its

opinion holds that the Commission's order does not authorize or permit the divisions complained of (R. 183), fails to command the carrier to do or refrain from doing anything, does not grant or withhold any authority or privilege, and does not abridge any power or facility (R. 184); that the Commission in fact entered no order, but merely declined to legislate (R. 180); that to exercise jurisdiction would amount to the determination of questions within the legislative and administrative jurisdiction of the Commission which the court was not free to consider; and that the bill should be dismissed for want of jurisdiction. (R. 184.) In its conclusions of law it found, among other things, that "there is no ground for, and the court is without jurisdiction to issue, an injunction against the eastern railroads, defendants herein, restraining them from continuing the present divisions of the transit rates." (R. 177.)

Final decree dismissing the petition for want of jurisdiction was entered April 22, 1932. (R. 184.) From the decree direct appeal to this court was taken. (R. 189.)

SUMMARY OF ARGUMENT

I. The Commission's order granted part of the relief sought by requiring increases in the Alton's divisions of the joint nontransit rates. The Alton does not seek to set aside this, the only affirmative part of the order. The Commission denied relief in respect of the divisions of the transit rates, mak-

ing no order in respect of them. The Alton's bill does not actually seek to set aside or enjoin any part of the Commission's order, but merely complains because of the denial of the affirmative administrative relief which it asked in respect of the divisions of the transit rates. The order, negative in form and substance, in so far as complained of, is one which, under the view consistently adhered to by this court, is not within the jurisdiction of the District Courts to review. *Procter & Gamble Co.* v. *United States,* 225 U. S. 282; *Hooker* v. *Knapp,* 225 U. S. 302; *Lehigh Valley R. R.* v. *United States,* 243 U. S. 412; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 482–483; *Piedmont & Northern Ry.* v. *United States,* 280 U. S. 469; *Standard Oil Co.* v. *United States,* 283 U. S. 235. Compare *Keller* v. *Pot. El. Power Co.,* 261 U. S. 428; *Radio Comm.* v. *General Electric Co.,* 281 U. S. 464, 469–470.

II. If the District Court had jurisdiction, appellant's petition should be dismissed for want of equity. At the time of the original order of Division 5, the Alton was in the hands of receivers. The report of Division 5 indicates it took that fact into consideration in making its order. At the time of the rehearing the receivership had ended, control of the Alton had been acquired by the Baltimore & Ohio, and it was not urged that increased divisions should be allowed on the ground that the Alton was in a weak financial condition.

The Commission was unable to find from the record before it that the transportation services of

the Alton for the performance of which it sought increased divisions, namely, transportation of grain, grain products, or grain by-products from Peoria to three particular junctions with the eastern carriers, is of importance to the public. This is an element which Section 15 (6) of the Act requires the Commission to consider in passing upon applications for increases in divisions of joint rates. The Alton has other junctions with the eastern carriers through which the haul of the Alton is shorter and through which the routes to the eastern destinations are shorter. The Commission found that on most of the traffic under consideration the route employed by the Alton is circuitous; that it is not necessary for this traffic after it reaches the Alton to move via its northern junctions; that the same joint rates apply via the more southerly junctions and that all of the traffic may now move through Ashland and Springfield, Ill., in connection with the Baltimore & Ohio. There are direct lines extending eastward to the destination territory over which this traffic can move.

An increase in the Alton's division for its haul from Peoria to Chicago would result in the Alton receiving greater revenue on shipments from points on the Alton, such as Kansas City, to Chicago, accorded transit at Peoria, than the Alton would receive on a like shipment moved direct to Chicago. The rates and divisions of rates over all other lines is the same as over the Alton. On traffic moving over any western line to Chicago destined to a point

in eastern territory, the line west of Chicago receives and retains its own rate to Chicago and the eastern line receives and retains its rate from Chicago to destination. The Alton in effect requested that the Commission compel the eastern lines to make a special concession to the Alton when it handled the traffic into Chicago by accepting less in the case of traffic interchanged with the Alton than on traffic interchanged with any other line. The Commission found that there was no transportation reason why they should accept less in the one instance than in the other.

The proportional rates from Peoria on two of the commodities involved, grain and grain by-products, on traffic originating in the Northwest, are now restricted so as not to apply over the Alton via Chicago or any junctions north of Chenoa, Ill. In view of the circuity of the route through Peoria on traffic originating in the Northwest the Commission suggested that the same restriction could readily be made on the third commodity involved, grain products. The Commission did not hold that the Alton must participate in this traffic via its northern junctions at a zero division, but, on the contrary, it declined to grant the Alton a division which would enable it to participate in the traffic via those junctions, suggesting that the same rate restriction against those junctions be extended to grain products.

The Commission's refusal to grant the Alton's request for increased divisions did not deprive it

of any statutory or constitutional right. Its right to a just and reasonable division stands on the same footing as the right of a shipper to a just and reasonable rate, both depending upon the administrative determination of the Commission.

It seems clear that the changes made in the divisions in question since the enactment of Transportation Act, 1920, were made "by mutual agreement between the interested carriers" within the meaning of Section 208 (b) of that Act. In any event the question whether these divisions were changed in alleged violation of that section seems wholly irrelevant, since the Commission is without authority to prescribe new divisions on the ground that those in effect were promulgated in alleged violation of that section.

The Alton is voluntarily a party to the joint rates in question and it is open to it to cancel the application of these rates via the particular junctions in question. Its divisions via other junctions are presumably reasonable. The Alton seeks to obtain a long haul on this traffic by transporting it to its northern junctions and exact a division from the eastern line which will shrink the latter's revenue below the amount which it obtains when the traffic is delivered to it by any other western carrier. The Commission was not compelled to grant the Alton increased divisions via these junctions and could not consider the Alton's revenues and interests alone but was bound to give consideration to the other matters which Section 15 (6) of the Act re-

quires that the Commission shall consider. *Brimstone R. R. Co.* v. *United States,* 276 U. S. 104, 114, 117; *B. & O. R. R.* v. *United States,* 277 U. S. 291, 300–301; *U. S.* v. *Abilene & So. Ry. Co.,* 265 U. S. 274, 284; *New England Divisions Case,* 261 U. S. 184, 193–194; *Beaumont, S. L. & W. Ry.* v. *U. S.,* 282 U. S. 74, 82; *Baltimore & Ohio R. R.* v. *United States,* 43 Fed. (2) 205. The action of the Commission in declining to grant the Alton increased divisions does not confiscate its property.

ARGUMENT

I

The Commission's order denying the affirmative relief sought in respect of the divisions of the transit rates was a negative order which the District Court had no jurisdiction to review

The Alton's complaint sought increased divisions of both the joint transit and joint nontransit rates. The Commission found that the nontransit rate divisions were unreasonable and by its order required that they be increased. The Alton has no complaint in respect of this, the only affirmative requirement of the order, and does not seek to have this requirement set aside. The Commission further found that the transit rate divisions were not unreasonable or otherwise unlawful and declined to grant the Alton relief in regard to them. The Alton's complaint is in respect of the denial of the affirmative relief sought in respect of these latter divisions.

Prior to the 1906 amendment of the Act to regulate commerce (c. 3591, 34 Stat. 584, 590), authorizing the Commission to establish through routes and joint rates, all joint rates were (as most still are) the result of agreements between carriers, which fix also the division or share of the joint rate to be received by each. *St. Louis S. W. Ry. Co.* v. *United States,* 245 U. S. 136, 139, note 2. The authority of the Commission over divisions of joint rates was strengthened by Transportation Act, 1920, amending section 15 (6) of the Interstate Commerce Act, but even that Act left the carriers free to establish, in the first instance, joint rates and the divisions of joint rates. The joint rates in question were not prescribed by the Commission, but were established by the carriers, and were joined in voluntarily by the Alton. The divisions of them were also fixed by the carriers. The eastern lines, not dependent upon the Alton for the traffic, were unwilling to accord the Alton the larger divisions that it demanded, and the Alton appealed to the Commission for relief.

The Commission, in the exercise of its administrative judgment, declined to grant that relief. The Commission did not fix the divisions complained of, it merely declined to order them to be changed. Its order merely had the effect of dismissing the Alton's complaint. It contains no requirement, command, or direction whatsoever in respect of the divisions in question. It does not approve, authorize, or require those divisions, does

not order the Alton or its connecting carriers to abide by the previously maintained divisions, does not direct the future maintenance of the existing divisions. It is negative both in form and in substance, amounting merely to a refusal by the Commission to grant the affirmative administrative relief sought.

Under the view consistently adhered to by this court, such an order is not within the jurisdiction of the District Courts to review. *Procter & Gamble Co.* v. *United States,* 225 U. S. 282; *Hooker* v. *Knapp,* 225 U. S. 302; *Lehigh Valley R. R.* v. *United States,* 243 U. S. 412; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 482–483; *Piedmont & Northern Ry.* v. *United States,* 280 U. S. 469; *Standard Oil Co.* v. *United States,* 283 U. S. 235. Compare *Keller* v. *Pot. El. Power Co.,* 261 U. S. 428; *Radio Comm.* v. *General Electric Co.,* 281 U. S. 464, 469–470.

The Urgent Deficiencies Act, c. 32, 38 Stat. 208, 219, under which this suit was brought, abolished the Commerce Court and transferred its jurisdiction to the several District Courts of the United States. The provisions conferring jurisdiction are found in c. 309, 36 Stat. 539, U. S. C., Title 28, sec. 41 (27) (28), and include the following cases:

> First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order

of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

In the *Procter & Gamble* case a bill was filed in the Commerce Court to set aside the Commission's order dismissing the complaint which alleged the unreasonableness of the railroads' rule for demurrage charges upon the complainant's privately owned cars while standing upon its privately owned tracks. The bill charged that the dismissal order was void and beyond the Commisison's power, in that it sustained the validity of the demurrage rule complained of, and that the charges exacted under the rule permitted the railroads to take complainant's property without compensation and deprive it of its property without due process of law. The bill prayed that the order be annulled and that the railroads be enjoined from collecting demurrage under the rule. (The similarity of the bill here is noteworthy.) The Commerce Court overruled motions to dismiss for want of jurisdiction, and, after consideration of the merits, dismissed the bill for want of equity. Upon appeal, this Court held that the Commerce Court was without jurisdiction, basing its decision upon two principal grounds, which may be briefly stated as follows:

1. The second class of cases over which the Commerce Court was given jurisdiction embraced only

complaints as to affirmative orders of the Commission, that is to say, the second subdivision of the statute gave the court the right to take cognizance when properly made of complaints concerning the legality of Commission orders and conferred power to relieve parties, in whole or in part, from the duty of obedience to affirmative orders which are found to be illegal and which were of such a nature that the court could enforce them under the jurisdiction conferred by the first subdivision of the statute.

2. To construe the statute as giving the Commerce Court the power to review negative orders of the Commission would necessarily imply the duty to exercise as an original matter the administrative functions of the Commission and would virtually overthrow the entire system of regulation which had arisen from the adoption and enforcement of the Act to regulate commerce, by destroying the necessity for the prerequisite action of the Commission, amounting of necessity to a substitution of the court for the Commission or at all events creating a divided authority on a matter where from the beginning primary singleness of action and unity was deemed to be imperative, and bringing about the contradiction and confusion which it had been the inflexible purpose of the lawmaker from the beginning to guard against. Compare *Great Northern Ry.* v. *Merchants Elev. Co.*, 259 U. S. 285, and cases cited.

Hooker v. *Knapp,* 225 U. S. 302, followed the *Procter & Gamble* decision, and established that the court is without jurisdiction to issue a mandatory injunction against the Commission, where it has issued a negative order, requiring it to reopen a case and grant the affirmative administrative relief which it has denied.

In *Lehigh Valley R. R.* v. *United States,* 243 U. S. 412, the court said that "there is nothing for a court of equity to enjoin if all that the Commission has done is to decline to extend the time during which the railroad can keep its boat line without risk." The carrier asked certain affirmative relief from the Commission, that is, permission to keep its boat line without risk of prosecution for violation of the Panama Canal Act. The Commission declined to grant that relief. The present case seems essentially similar.

In *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 482–483, as here, the real cause of complaint was the failure of the Commission to fix divisions of joint rates: "Recognizing the Railway as a common carrier to which allowances and divisions might be accorded by the trunk lines, and that through routes were in operation between the Railway and those lines, it fixed the maximum joint rates and went no further for the present. The real ground for resorting to the courts in this case is the failure to fix divisions." The conclusion of the court was stated as follows:

> In effect the District Court was asked to perform a function specifically conferred by law upon the Commission. But that court has only the same jurisdiction that formerly was vested in the Commerce Court (Act of June 18, 1910, c. 309, 36 Stat. 539; Act of October 22, 1913, c. 32, 38 Stat. 208, 219); and it is settled that this does not permit the court to exercise administrative authority where the Commission has failed or refused to exercise it, or to annul orders of the Commission not amounting to an affirmative exercise of its powers. *Procter & Gamble Co.* v. *United States,* 225 U. S. 282, 292, *et seq.* (*Ibid.,* 483.)

It seems obvious that the same principle applies in the case at bar. Here the Alton asked the Commission to exercise its administrative function by fixing new divisions, but the Commission refused to do so.

In *Piedmont & Northern Ry.* v. *United States,* 280 U. S. 469, the District Court entered a decree dismissing the bill on the merits. On appeal this court reversed the decree on the ground that the bill should have been dismissed for want of jurisdiction instead of on the merits, holding that the order denying the certificate, being negative in substance as well as in form, infringed no right of the railway, citing *Procter & Gamble Co.* v. *United States, supra, Lehigh Valley Railroad Co.* v. *United States, supra, United States* v. *New River Co.,* 265 U. S. 533.

In the recently decided *Standard Oil case,* 283 U. S. 235, complaint was filed with the Commission for recovery of alleged overcharges. The Commission, upon interpretation of the complicated tariffs involved, found there were no overcharges and dismissed the complaint. In the opinion of this Court, which affirmed the decree of the District Court dismissing the bill to enjoin the negative order for want of jurisdiction, it was said that the question of jurisdiction depended upon the correct interpretation and application of the second subdivision of the statute conferring jurisdiction, quoted above, and that

> necessarily the District Court was without jurisdiction under the *settled construction* (italics ours) of that provision by which the authority of the court is limited to the review of affirmative orders, with "power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal."[1]

The order in the present case, in so far as complained of, not being an affirmative order, is incapable of enforcement under the first subdivision of the statute conferring jurisdiction, and, since it

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[1] Citing *Procter & Gamble* v. *United States*, 225 U. S. 282, 292–293; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 483; and *Piedmont & Nor. Ry Co.* v. *United States*, 280 U. S. 469, 477. See also *Great Northern Ry.* v. *United States*, 277 U. S. 172; *United States* v. *Illinois Central R. R. Co.*, 244 U. S. 82; *Delaware & Hudson Co.* v. *United States*, 266 U. S. 438; *United States* v. *Los Angeles & Salt Lake R. R. Co.*, 273 U. S. 299.

makes no requirement and contains no word of command, it is obviously one from the duty of obedience to which no party could be relieved.

Intermountain Rate Cases, 234 U. S. 476, *Chicago Junction case,* 264 U. S. 258, and *United States* v. *New River Company,* 265 U. S. 533, cited by appellant, do not modify the settled construction of the statute. The order reviewed in the *Intermountain Rate cases* was not a negative order. It divided the United States into five zones and specified the extent to which the transcontinental carriers could be relieved from the operation of the long-and-short haul clause of the fourth section of the Act on traffic to Pacific Coast points from each of the five zones. In the *Chicago Junction case* it was held that permissive orders, such as there involved, are reviewable, and in that case the court, referring to the *Procter & Gamble, Hooker* v. *Knapp,* and *Lehigh Valley cases,* stated that judicial review was refused in those cases not merely because in each the order was negative in character but because each was a denial of the affirmative relief sought. In the *New River case* the order was negative in form though affirmative in substance and judicial review was held permissible because the Commission's order granted affirmative relief sought. It is submitted that the order in the case at bar is negative in both form and substance, because it made no change in the existing status and is an order which, like the orders held not reviewable in the *Procter &*

Gamble, Hooker v. *Knapp, Lehigh Valley,* and *Manufacturers Ry. cases,* merely constituted a denial of the affirmative relief sought.

An injunction restraining the eastern carriers from applying the present divisions would not have the effect of restoring any previously existing divisions or putting into effect any other divisions. A change in the present divisions could be required only by the exercise of administrative functions.

Appellant seeks to distinguish the *Piedmont & Northern case* on the ground that it has a legal right to just and reasonable divisions and that the divisions against which it complained are unjust and unreasonable on their face. But Congress in delegating the legislative power to the Commission to precribe what in its judgment are just and reasonable divisions for the future required that the Commission consider a number of matters and when the Commission, after considering those matters, has declined to order changes in divisions, an appeal to the courts which urges that the divisions that the Commission has declined to change are unjust and unreasonable, but invites the court to exercise administrative functions and brings the case within the teeth of the consistent holding of the court that the statute conferring jurisdiction does not permit the court to exercise administrative authority or to annul orders of the Commission not amounting to an affirmative exercise of its powers.

The opinion of the court below held that this case can not be distinguished from the decision in the

Procter & Gamble case, and, after reviewing the cases above cited and others, referred to the following matters:

The division of freight rates is left as a matter of contract to the carriers in the first instance. There is no requirement in the Act that divisions must be filed with the Commission or that anything shall be done to make such divisions official acts of the Commission or that official endorsement of same be made. While joint rates must be filed with the Commission, divisions of joint rates, in the absence of Commission requirement, are not so filed but are left to and fixed by the carriers themselves. The Interstate Commerce Act (Section 15 (6)) gives the Commission jurisdiction, upon complaint of an aggrieved party or upon its own motion, to prescribe divisions to take the place of those fixed by the carriers.

When, in pursuance of constitutional power so to do, Congress creates a body such as the Interstate Commerce Commission and grants it power to regulate commerce and fix divisions of joint rates, it places such power within the custody of a body representative of the legislative branch of the government. The power to fix rates or to make divisions of rates is lodged in the legislative branch of the government. *Term. R. R. Assn.* v. *United States,* 266 U. S. 17, 30–31; *Keller* v. *Potomac Elec. Power Co.,* 261 U. S. 428, 440; *Ohio Valley Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289; *L. & N. R. R. Co.* v. *Garrett,* 231 U. S. 298, 305; *Interstate*

Commerce Com. v. *Humboldt S. S. Co.,* 224 U. S. 474, 483; *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, 226. Clearly, there must be some administrative order upon divisions, in pursuance of the Commission's legislative power, before it can be said that legislation has occurred. In the present case the Alton, dissatisfied with divisions forced upon it by its connecting carriers which afford it only an alleged confiscatory return or none at all, and finding itself unable to agree with its joint associates as to any modified divisions of joint rates, made its appeal that the Commission exercise its legislative power, find the existing divisions unfair, and fix fair ones.

After an examination of the facts, the Commission found that the divisions were not unfair and dismissed the complaint. It entered no other order, it merely declined to legislate. It did not order the Alton or its connecting carriers to abide by the previously maintained divisions, it did not direct the future maintenance of the existing divisions; its action was equivalent to saying that it did not find the situation such that it should fix divisions; that is, it found no reason to exercise its legislative administrative power. The court then held:

> We are now asked to enjoin this order of dismissal. Petitioner appeals to us for a decree against a legislative body enjoining its refusal to enact legislation. Such relief is beyond judicial discretion. The judiciary

may not by mandatory injunction force a legislative or administrative branch of the government to exercise its legislative power. Refusal to legislate to prevent confiscation is subject matter over which a judiciary has no jurisdiction.

Suppose the act creating and granting jurisdiction to the Interstate Commerce Commission had never been enacted and consequently the power so to legislate as to fix divisions of rates remained solely in Congress. Then suppose, in the absence of such legislation, petitioner had applied to Congress for legislation fixing new divisions upon the plea that those heretofore enforced by its associate joint carriers are confiscatory. Could it be successfully contended that the judiciary might by any decree interfere with the action of Congress in failing to legislate? It is obvious that the courts would have no such power. "Litigation can not arise until the moment of legislation has past" (*Prentis* v. *At. C. L. Co.*, 211 U. S. 210 at 227). A corollary to this sentence from Mr. Justice Holmes is that litigation is powerless to compel legislation. (R. 180.)

We submit that this holding of the court below is sound. It is in accord with numerous decisions of this Court such as *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 227; *Terminal R. R. Assn.* v. *United States*, 266 U. S. 17, 30–31; *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 440, and the very recent expressions in *Radio Comm.* v.

General Electric Co., 281 U. S. 464, 469–470, and *Arizona Grocery Co.* v. *Atch. Ry.*, 284 U. S. 370, 386, which emphasize the legislative character of rate making and rule making for the future by administrative bodies created by Congress to act for it in the regulation of interstate commerce within the scope of the powers delegated.

The court below properly dismissed the bill *for want of jurisdiction.*

II

If the District Court had jurisdiction, appellant's petition should be dismissed for want of equity

In the event the court overrules the holding below that the Commission's order, in so far as complained of, is negative in form and substance and therefore not subject to judicial review, and considers the case on the merits, then we submit that the appellant's petition should be dismissed for want of equity.

Under Section 15 (6) of the Interstate Commerce Act, as interpreted by this court in such decisions as the *New England Divisions case*, 261 U. S. 184, and the *Orient Divisions case* (*United States* v. *Abilene & Southern Ry.*), 265 U. S. 274, it is within the power of the Commission, in the public interest, to take into consideration the financial needs of a weak road and give it a division larger than justice merely as between the respective carriers would suggest, in order to maintain it in effective operation as part of an adequate

transportation system, provided the share left to its connections is adequate to avoid a confiscatory result. At the time of the filing of the complaint and the order of Division 5, the Alton was in the hands of receivers. The report of Division 5 indicates that it took this fact into consideration in making its order:

> Any divisions of these joint rates which we have power to prescribe will aid the Alton only toward attaining the amount of revenue required to pay its operating expenses and taxes. A fair return on the Alton's railway property held for and used in this service of transportation is brought in question here only to the extent that fair divisions of the rates on these commodities may contribute thereto. The Alton is in the hands of receivers. We may take this into consideration, but we may not base our conclusions wholly thereon. *United States* v. *Abilene & S. R. Co.,* 265 U. S. 274; *New England Divisions Case,* 261 U. S. 184. (R. 30.)

Prior to the rehearing, the changes in the status of the Alton hereinbefore related had taken place. The Alton Railroad Company had been formed, had acquired and was operating the lines of railroad formerly constituting the Chicago & Alton Railroad System, and the Baltimore & Ohio Railroad Company had in turn acquired control of the Alton. (R. 42, 173.) These changes were urged in the petition of the eastern carriers as a ground for rehearing. (R. 153.) In the report of the

Commission on rehearing these additional "facts of importance" were noted (R. 42) and it is evident from the report as a whole that the Alton, as thus controlled by the Baltimore & Ohio (one of the defendants), did not urge increased divisions on the ground that it was in a weak financial condition.

Even where a carrier is weak, the Commission must consider whether its transportation services are important to the public. In its report the Commission related certain facts which, it said, "are important in our consideration of 'the importance to the public of the transportation services' of the Alton for the performance of which it is here seeking increased divisions, an element which Section 15 (6) of the Act requires us to consider." The Commission further said (R. 48) that "no shipper or community has expressed any concern over the continuance of those transportation services by the Alton, and

> this record affords no support for a finding that they are important to the public."

The Commission pointed out in its report that on most of the traffic here considered the route employed by the Alton is circuitous; that the proportional rates from Peoria apply in connection with the Alton, not only via Chicago, Joliet, and Dwight [1]

[1] This is subject to the qualification that the rates on grain and by-products of grain originating in Northwestern territory do not apply via these junctions or via any junctions north of Chenoa.

but also via junctions south of Dwight, such as Chenoa, Ill., to which the haul of the Alton is considerably shorter than to Dwight, and it is not necessary for this traffic after it reaches the Alton to move via its northern junctions and that all of this traffic may now move through Ashland and Springfield, Ill., in connection with the Baltimore & Ohio. (R. 47–48.)

Further, it is obviously not of importance to the Peoria shippers, shipping traffic from Peoria to points in the east over the Alton as initial carrier, that the Alton should interchange the traffic with the eastern lines at particular junctions when it has other junctions via which the distances are as short, if not shorter, and through which the traffic can move at the same rates. Frequently the transportation services of a carrier are found to be of public importance to a particular community when it is the only railroad serving that community. This is not true of the Alton in so far as the Peoria-Pekin district is concerned. The shippers of the traffic in question are actually served by the rails of the Peoria & Pekin Union Railway, a switching or belt line which connects with all the carriers reaching the Peoria-Pekin district. (R. 99–100; see also 93 I. C. C. 3; 115 I. C. C. 470.) There are numerous other lines than the Alton over which the traffic can be shipped. Among these are the Rock Island and the Burlington, which, like the Alton, operate lines from Peoria to Chicago. (R. 44–45.) Three trunk-line carriers operating lines from Chicago to

the eastern territory also reach and serve Peoria, namely, the Pennsylvania, the New York Central (Big 4) and the New York, Chicago & St. Louis (Nickel Plate). (Exhibit 23, a large map depicting the various railroads involved and showing the routes and junction points.)

These three lines are thus in a position to handle the traffic over their own rails the entire distance from Peoria to the eastern destinations which they also reach, without dividing the rate with any other line. Being thus in a position to handle the traffic themselves, they are unwilling to accept a division of the Peoria proportional rates less than their Chicago proportional rate in order to allow the Alton to take the traffic in competition with them at Peoria, haul it to Chicago, and there deliver it to them. The Toledo, Peoria & Western also has a direct line extending eastward from Peoria and with connections forms another through route to the east over which this traffic may move from Peoria. As previously stated, the rates over all these other lines and their connections to any given destination in eastern territory is the same as over the route formed by the Alton as the initial carrier. (Cf. *Grain Rates in Central Freight Association Territory,* 28 I. C. C. 549, 558; *Low Moor Iron Co.* v. *C. & O. Ry.,* 42 I. C. C. 221, 227; *Board of Trade* v. *N. & W. Ry.,* 26 I. C. C. 146, 150; *Star Grain & Lumber Co.* v. *A., T. & S. F. Ry.,* 14 I. C. C. 364, 370.)

In *Chicago & Alton R. R. Co.* v. *T., P. & W. Ry. Co.,* 146 I. C. C. 171, cited by appellant at page 62 of its brief, the Commission found that public interest required continued operation of freight trains of the Alton under trackage rights over the Toledo, Peoria & Western Railway between Washington, Ill., and Peoria, Ill. This finding is not contrary to the Commission's finding in the case at bar that this record affords no support for a finding that the transportation services of the Alton for the performance of which it here sought increased divisions are important to the public. Inasmuch as this case related only to divisions of particular joint rates on grain and its products when moving via certain junctions, the question of the importance to the public of the transportation services generally of the Alton was not in issue, but only the importance to the public of the transportation services of the Alton for the performance of which it sought increased divisions, namely, transportation from Peoria to three particular junctions with the eastern carriers.

As pointed out in the Commission's report, an increase in the Alton's division for its haul from Peoria to Chicago would result in the Alton receiving greater revenue on a shipment from Kansas City, for example, to Chicago accorded transit at Peoria than it would receive on a like shipment moved direct to Chicago. (R. 47.) The Alton's rate from Kansas City to Chicago is 16

cents. (Ex. 24.) Its rate from Kansas City to Peoria is 14 cents (R. 137) and its present division from Peoria to Chicago (on traffic originating at Kansas City, which is in Trans-Mississippi territory) is 2 cents, resulting in a total compensation of 16 cents, or the same as its own published rate from Kansas City to Chicago. It may be suggested that the Alton should have greater revenue on the shipment accorded transit than on the direct shipment, but if this is so, then the additional revenue should come from a separate charge for the transit, rather than out of the eastern line's revenue. In the Commission proceeding the Alton asked that its divisions be increased to 20 per cent of the rate. If this had been granted, it would have increased the Alton's division of 2 cents to 6.5 cents (20 per cent of 32.5 cents), and would have altered the revenues of the respective carriers as follows: On a shipment from Kansas City to New York, transited at Peoria, it would have increased the Alton's revenue from 16 cents to 20.5 cents (Alton's rate of 14 cents to Peoria plus its division of the Peoria-New York rate of 6.5 cents) which is 4.5 cents greater than its rate to Chicago, and it would have reduced the revenue of the eastern line from 30.5 cents to 26 cents, which latter amount is 4.5 cents less than its Chicago-New York rate. At the same time, the revenue of the eastern line for its haul from Chicago to New York, on traffic reaching its rails over any other western line than the Alton would remain at 30.5 cents.

The situation is the same on all other railroads. For example, on a shipment transported by the Chicago, Rock Island & Pacific Railway from Goodland, Kans., a local point on its line in Trans-Mississippi territory, to Peoria and after transit there shipped out over the Rock Island to Chicago, thence an eastern line to destination, the Rock Island receives and retains for its haul from Goodland to Peoria its local rate of 32.5 cents and for its haul from Peoria to Chicago its 2-cent division, or a total compensation of 34.5 cents, which is the same as its rate from Goodland to Chicago. (Ex. 24.) The eastern line would receive, if the destination were New York, an amount equivalent to its Chicago-New York rate of 30.5 cents. If the outbound shipment hauled by the Rock Island from Peoria had originated upon or had been transported to Peoria by another line, then the Rock Island's total compensation would have been its 2-cent division, the same as the Alton receives in all cases where the traffic reaches Peoria over the rails of a line other than the Alton. As stated in the Commission's report—

> The Chicago, Rock Island & Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company also serve Peoria and have their own rails between Kansas City, Mo., and Chicago, as does the Alton. The rate situation on this traffic and the divisions of the applicable rates are the same over the routes of these lines as

they are over the route of the Alton, but only the latter is complaining. R. 44–45.)

The 16-cent rate from Kansas City to Chicago applies not only over the Alton but over all other railroads between those points, including the Rock Island, the Burlington and the Santa Fe. On traffic moving over any of these lines to Chicago, destined to a point in eastern territory, the line west of Chicago receives and retains its own rate to Chicago and the eastern line receives and retains its rate from Chicago to destination. On a shipment from Kansas City to New York, for example, moving over the Santa Fe to Chicago, thence New York Central, the Santa Fe's revenue is its rate of 16 cents to Chicago, and the New York Central receives as its revenue its rate of 30.5 cents. These rates would be applicable whether the shipment moved through in continuous transportation or whether it was stopped at Chicago or at any intermediate point west of Chicago for transit.

On traffic originating in any of the western origin territories and reaching the rails of the eastern carrier at Chicago over any other line than the Alton, the eastern line receives and retains its Chicago-to-destination rate without being called upon to divide it with any other line.

In its complaint the Alton did not ask that the Commission require the eastern lines to shrink their revenues on traffic delivered to them at Chicago by

any of the other western lines, but in effect requested that the Commission compel the eastern lines to make a special concession to the Alton when it handled the traffic to Chicago, by accepting less in the case of traffic interchanged with the Alton than on traffic interchanged with any other line. The eastern lines were unwilling to do this, and the Commission found that there was no transportation reason why they should accept less in the one instance than in the other.

Inasmuch as the outbound proportional rates from Peoria are actually transit rates, they may not be considered standing alone, nor may the divisions thereof be considered by themselves, but both must be considered in the light of the fact that they apply on shipments to and from the transit point, which, though distinct in fact, are treated for transit purposes as continuous through shipments. (R. 45–47.)[1]

The lines of the Alton reach and serve Trans-Mississippi and Illinois-Iowa territories in part.

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[1]As stated in *Central R. R. Co.* v. *United States*, 257 U. S. 247, 257, the transit privilege, under which shippers are accorded a more favorable basis of rates than would obtain if the inbound and outbound movements to and from the transit point were treated as separate shipments, "rests upon the fiction that the incoming and the outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination." Compare *United States* v. *L. & N. R. R. Co.*, 235 U. S. 314, 324–325; *A., T. & S. F. Ry.* v. *United States*, 279 U. S. 768.

Whenever the Alton obtains the inbound haul to Peoria as well as the outbound haul from Peoria to Chicago its total compensation (its rate to Peoria plus its division of 2 cents from Peoria to Chicago) is the same as its own published rate from point of origin to Chicago, as shown above.

The lines of the Alton do not, however, reach Northwestern territory and hence it is not in a position to obtain both the inbound and outbound hauls to and from Peoria on traffic originating in that territory. There are direct lines from that territory to Chicago, such as the Chicago & North Western, the Chicago, Burlington & Quincy, the Chicago, Milwaukee, St. Paul and Pacific, and the Minneapolis, St. Paul & Saulte Ste. Marie. The rate over all these lines from Minneapolis (a typical point in Northwestern territory) to Chicago and to Peoria is 11.5 cents. The rate from Chicago to New York is 30.5 cents and likewise the rate from Peoria, on traffic originating in Northwestern territory, is 30.5 cents. When the traffic is handled over a direct line from Minneapolis to Chicago that line collects its 11.5-cent rate and the eastern line receives its Chicago-New York rate of 30.5 cents. The eastern line was unwilling to shrink its rate in order to allow the Alton to participate in this traffic.

The Commission found that the route embracing the line of the Alton, under which the traffic would first move southbound to Peoria and then northbound over the Alton for a distance of 155 miles to Chicago, is circuitous. The Commission declined

to grant the Alton a division which would enable it to participate in this traffic via its northern junctions, pointing out that it is not necessary for this traffic to move through those junctions and that it can move through more southerly junctions at the same rates. (R. 47–48.) The record shows that the Alton has junctions at Bloomington, Ill., with the Cleveland, Cincinnati, Chicago & St. Louis, Illinois Central and New York, Chicago & St. Louis; at Atlanta, Ill., with the Pennsylvania Railroad; at Chenoa, Ill., with the Toledo, Peoria & Western; and at Springfield and Ashland, Ill., with the Baltimore & Ohio, which now controls the Alton. (Ex. 23.) The carriers themselves have recognized the circuity of the routes through the Alton's northern junctions. At the present time the proportional rates on grain and by-products from Peoria, on traffic originating in the Northwest, are restricted so as not to apply over the Alton via Chicago or any junctions north of Chenoa, Ill. (R. 48, 87, 89.) Formerly, the same restriction applied on grain products too, and the Commission said in its report that this restriction now "could readily be made" on grain products. (R. 48.)

Interchange of the traffic between the Alton and the eastern lines at junctions south of Chicago, Joliet, and Dwight will obviously tend to reduce the circuity of the route. And the Commission suggested that the application of the grain-products rates on Northwestern traffic be canceled via

the northern junctions. The Commission did not hold that he Alton must participate in this traffic via its northern junctions at a zero division, but on the contrary it declined to grant the Alton a division which would enable it to participate in the traffic via those particular junctions.

The situation as to traffic originating in Northern Iowa territory is practically the same as in the case of traffic originating in Northwestern territory, and what has been said respecting the latter territory applies with equal force to Northern Iowa territory.

In *Grain Rates in Central Freight Association territory,* 28 I. C. C. 549, involving rates on grain from Illinois to the east, the Commission said:

> Several lines of railroad run east and west through the state of Illinois and thence east to the Atlantic seaboard. These are the short lines from the territory traversed, and are called east and west lines. Several other lines of railroad extend north and south through the state of Illinois, converging upon Chicago, which are known as north and south lines. The north and south lines cross the east and west lines at numerous junction points.
>
> If grain at one of these junction points moves to the eastern market by the direct line, the north and south line obtains no part in the transportation. If grain at some point upon the north and south line were to move to the same market by the shortest line, the north and south line would ordinarily trans-

> port it a short distance to a junction point with some east and west line which would carry it from there to destination. In neither case would the north and south line obtain any considerable haul.
>
> At Chicago are found certain east and west lines which do not tap the state of Illinois to any considerable extent by their own rails and which, therefore, will not participate in the handling of this grain unless it is brought to Chicago by the north and south line. Chicago itself is the greatest grain market in the United States, and its merchants desire to handle this grain.
>
> Owing to these various competitive conditions it long ago came to pass that grain rates to eastern destinations from points in Illinois were the same through Chicago as by the direct line, even though the distance was materially greater. At Chicago certain transit privileges were allowed so that the grain could be merchandised at that point and sent on at the balance of the through rate. (*Ibid.*, 555–556.)

And at page 558 the Commission, after holding that the grain shipper of Illinois is entitled to a reasonable rate by the direct line, made the following statement in reference to divisions of the indirect line:

> If the line via Chicago can not obtain reasonable compensation when operating over the circuitous route, it can retire from the business.

The Commission's refusal to grant the Alton's request for increased divisions did not deprive it of any statutory or constitutional right. Its right to a just and reasonable division is not superior to the right of a shipper to a just and reasonable rate—both depend upon the administrative determination of the Commission. Compare *Sprunt & Son* v. *United States,* 281 U. S. 249, 255; *United States* v. *Merchants & Mfgrs. Traffic Assn.,* 242 U. S. 178, 188; *Edward Hines Trustees* v. *United States,* 263 U. S. 143, 147, 148; *Lehigh Valley case,* 243 U. S., *supra; Piedmont & Northern case,* 280 U. S., *supra.*

Appellant argues that the divisions in question were promulgated in violation of Section 208 (b) of Transportation Act, 1920, providing that—

> All divisions of joint rates, fares, or charges, which on February 29, 1920, are in effect between the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by mutual agreement between the interested carriers or by State or Federal authorities, respectively.

A similar provision in paragraph (a) of the same section provided for the continuance of all rates in force on the same date until changed according to law. These two provisions were amongst many others grouped under Title II relating to "Termination of Federal Control." Rates and divisions of rates during Federal control were

established by the Director General of Railroads, and the evident purpose of these provisions was to maintain their standing upon the return of the railroads to their owners, and no doubt had relation to the guaranty to carriers during the six-month period after Federal control provided for in section 209. Eight years later, or on July 1, 1928 (R. 85 and appellant's brief, page 5), the divisions against which the Alton complained were made effective. The record is not very clear as to what changes in these divisions, if any, were made during the period from the end of Federal control, February 29, 1920, to July 1, 1928. But it seems clear that these divisions were changed "by mutual agreement between the interested carriers" within the meaning of Section 208 (b), Transportation Act.

It is admitted they were not changed by State or Federal authorities, (appellant's brief, page 20) and since the appellant accepted and moved traffic at the new divisions under its voluntary participation in the joint rates via the junctions in question, without making any effort to cancel the application of its rates via those junctions, and without making complaint to the Commission respecting those divisions until June 21, 1929, or nearly a year after the divisions became effective, it must be assumed, at least for the purposes of said Section 208 (b), that it agreed to them. In any event, this question under Section 208 seems to be wholly irrelevant to

the validity of the Commission's action, since the Commission is without authority to prescribe new divisions on the ground that those in effect were promulgated in alleged violation of that section.

The appellant's contention that the Commission's disposition of the case had the result of leaving in effect the divisions complained of and of leaving the Alton in the position of being required to perform a transportation service under joint rates out of which it received divisions which are less than the cost of the service and that, therefore, its property is confiscated, overlooks the fact that the Alton is voluntarily a party to the joint rates in question. It is open to the Alton to cancel the application of these rates over its line, via the particular junctions in question. It will be remembered, too, that the Alton's complaint to the Commission did not put in issue the reasonableness of the Alton's divisions via all its junctions with the eastern carriers but only those applicable when the traffic moves through Chicago, Joliet, and Dwight. Since the Alton did not challenge the reasonableness of the divisions through those other junctions, it must be presumed that they are satisfactory to the Alton. The Alton seeks to obtain a long haul on this traffic, to turn the traffic over to an eastern line at its northern junctions for further transportation to destination, and to obtain a division from the eastern line which will shrink the latter's revenue below the amount which it obtains when

the traffic is delivered to it by any other western carrier.

The appellant's contention erroneously presupposes that the Alton has an adjudicated or vested right to participate in the transportation at the joint rates in question, to haul the traffic to certain junctions which it prefers, and to receive from the carriers connecting with it at those junctions a compensatory division at all events and regardless of the effect on their revenues; and further, that the Commission is bound to issue an affirmative order against the carriers connecting with the Alton at those junctions requiring them to accord increased divisions to the Alton upon consideration of the Alton's revenues and interests alone and without giving consideration to the other matters which the statute in section 15 (6) requires that the Commission shall consider in prescribing or determining the divisions of joint rates. *Brimstone R. R. Co.* v. *United States,* 276 U. S. 104, 114, 117; *B. & O. R. R.* v. *United States,* 277 U. S. 291, 300–301; *U. S.* v. *Abilene & So. Ry. Co.,* 265 U. S. 274, 284; *New England Divisions Case,* 261 U. S. 184, 193–194; *Beaumont, S L. & W. Ry.* v. *U. S.,* 282 U. S. 74, 82; *Baltimore & Ohio R. R.* v. *United States,* 43 F. (2d) 605 (affirmed, 284 U. S. 195, on other grounds).

The fact that there is no order or requirement of the Commission establishing the through routes over the Alton through the particular junctions in

question or prescribing or requiring the joint rates applicable over those through routes, that there is no order or requirement that the Alton continue its participation in the traffic through these particular junctions, and that the order in question contains no affirmative requirement and places the Alton under no compulsion whatever, precludes the possibility that the order could operate to confiscate the Alton's property. Action of a governmental body which has no scintilla of compulsion against the carrier can not have the effect of taking its property in contravention of the Constitution.

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

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OCTOBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932

SUPREME COURT OF THE UNITED STATES.

No. 81.—October Term, 1932.

The Alton Railroad Co., Appellant, *vs.* The United States of America, et al.	On appeal from the District Court of the United States for the Northern District of Illinois.

[December 5, 1932.]

Mr. Justice Brandeis delivered the opinion of the Court.

This suit, under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220, was brought by The Alton Railroad Company in the federal court for northern Illinois to set aside part of an order entered by the Interstate Commerce Commission under § 15 (6) of the Interstate Commerce Act, see Transportation Act, February 28, 1920, c. 91, § 418, 41 Stat. 456, 475, 486. The defendants are the United States and, by intervention, the Commission and carriers adversely interested. The proceeding before the Commission was commenced by the receivers of the Chicago & Alton "to establish, just, reasonable, and equitable divisions" of existing joint rates for grain and grain products from Peoria, Illinois, to points east of Buffalo.[1] The Commission found that the divisions of the so-called "local" rates were too low, and ordered them increased. It found that the divisions of the so-called "reshipping" rates were "not unjust, unreasonable or otherwise unlawful" and refused relief as to them. *Wheelock, et al, Receivers* v. *Akron, Canton & Youngstown Ry. Co.*, 169 I. C. C. 594; 179 I. C. C. 517.[2] The Alton Railroad (the corporation which acquired the line under the reorganization, *Alton R. R. Co. Acquisition*

[1]The proceedings before the Commission involved also the rates from Pekin, which lies about ten miles from Peoria. But as the inbound and outbound rates to and from these two points and the transit regulations and practices in effect are the same as to both, only Peoria will be referred to.

[2]Division 5 of the Commission, after a hearing, found that the share accorded the Alton was unreasonable and otherwise unlawful, and fixed new divisions. On petition by the defendants, the order of Division 5 was in-

and Stock Issue, 175 I. C. C. 301), insists that by so denying relief the Commission has, in view of the facts specifically found, subjected its property to confiscation; and on this ground seeks to have that part of the order set aside.

Lines of the Alton extend from Peoria to Chicago, Joliet and Dwight, Illinois and at each of those cities connect with railroads whose lines extend to the East. Peoria is an important market for grain received from the West and Northwest. At Peoria the grain goes into elevators. There it may be sold and resold or it may be manufactured into grain products and by-products.

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definitely postponed and a rehearing before the full Commission granted. The order entered by the full Commission reads as follows:

"This case having been reheard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report on rehearing containing its findings of fact and conclusions thereon, which said report, together with the original report and order herein, 169 I. C. C. 594, is hereby referred to and made a part hereof; and the commission having found in said report on rehearing, (1) that just, reasonable, and equitable divisions to be received, respectively, by complainants herein and the defendant carriers east of Chicago, Joliet, or Dwight, Ill., out of the joint nontransit rates on grain, grain products, and grain by-products, in carloads, from Peoria and Pekin, Ill., via Chicago, Joliet, or Dwight, to destinations in eastern trunk-line and New England territories, east of Buffalo, N. Y., over the lines of complainants to Chicago, Joliet, or Dwight, will be the specific or arbitrary over the Chicago reshipping rate to complainants and the reshipping rate from Chicago to destination to the carriers defendant east of Chicago; and (2) that the present divisions of joint reshipping or proportional rates on grain, grain products, and grain by-products, in carloads, from Peoria and Pekin over the lines of complainants to Chicago, Joliet, or Dwight, destined to points in eastern trunk-line and New England territories east of Buffalo, are not unjust, unreasonable, or otherwise unlawful as alleged by complainants:

"It is ordered that the aforementioned original order of November 28, 1930, be, and it is hereby, vacated and set aside.

"It is further ordered that the above-named defendants, according as they participate in the transportation, be, and they are hereby notified and required to cease and desist, on or before January 16, 1932, and thereafter to abstain from demanding, collecting, or receiving divisions of the joint nontransit rates specified in the preceding paragraph which do not allow said complainants the divisions found in said reports to be just, reasonable, and equitable.

"And it is further ordered that this order shall continue in force until the further order of the commission."

Much of the grain is later shipped from Peoria to the East in the form of grain products and by-products. The transportation of grain consigned to Peoria is completed, however, by the unloading of the cars there and the payment of charges. The carriers serving Peoria have not established joint rates from such points of origin of the grain to the East, with a transit privilege at Peoria. Compare *Central R. R. Co.* v. *United States*, 257 U. S. 247. But the tariffs of outbound joint rates from Peoria to points east of Buffalo, voluntarily established by the Alton and connecting railroads, provide for a lower scale of rates applicable, under certain conditions, to grain and the products of grain which had a rail movement inbound from the territory referred to. This lower scale is called "reshipping" rates; and the merchandise shipped thereunder is called transit grain or grain products.[3] The higher scale applicable to other grain or grain products is called "local" rates. Compare *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 279 U. S. 768.

Until July 1, 1929, the divisions of both classes of rates were fixed by agreement of the Alton and the connecting lines. Then, the connecting lines, without the sanction of the Commission and over the protest of the Alton, reduced, for both classes of rates, the amounts paid to it as divisions. The connecting lines were and are physically in a position to deprive the Alton of a larger share by reason of the fact that the freight is collected at the destinations

[3]Reshipping rates from Peoria vary somewhat with the point of origin of the grain. A subsequent outbound shipment of grain or its products may be from a shipment which did not move inbound from the territory above referred to. But the shipper, in order to avail himself of the reshipping rates on outbound grain, grain products or by-products, must establish the fact that he sent an equivalent amount of like grain from the point of origin to Peoria within the twelve-month period allowed for transit privileges. This proof is made by the presentation of paid freight bills as memoranda of the inbound shipments. Compare Surrendered Tonnage Slips at Transit Points, 77 I. C. C. 239. The inbound and outbound shipments are carried under separate bills of lading; the final destination of the grain is usually undetermined at the time of the inbound shipment. In this respect the practice differs from that of through shipment with transit privileges. On the prevalence, legality, and possible abuses of both reshipping rates and through rates with transit privileges, see Atchison, T. & S. F. Ry. v. United States, 279 U. S. 768, 777-780, and cases there cited.

and distributed by the collecting carrier. The haul on the Alton outbound from Peoria is from 82 to 155 miles, dependent upon the route selected. The divisions constitute the only revenue received by the Alton for the service performed by it under the "reshipping" rates. Under the reduced allowances the Alton does not receive on any shipment more than 2 cents per 100 pounds and on many shipments it receives nothing.[4] The Commission did not suggest that the divisions so received could be deemed compensatory for the outbound haul. It justified its conclusion that the divisions were not "unjust, unreasonable, or otherwise unlawful" on the ground that the transportation service for the performance of which the Alton sought increased divisions was not of importance to the public; and that if the Alton desired to participate in the transportation and was dissatisfied with the share allotted, it should secure in some way allowances from the carriers which bring the grain into Peoria.

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[4]As stated in note 3, *supra*, the reshipping rates from Peoria to the East vary with the points of origin of the grain or grain product. Thus the reshipping rate from Peoria to New York on grain originating in the Northwest is 30.5 cents per 100 pounds, while that on grain originating in the Illinois-Iowa territory is 32.5 cents. On grain originating at other points the rates fall somewhere between these two figures. The outbound reshipping rate from Chicago to New York, with exceptions not material here, is 30.5 cents irrespective of the point of origin. The inbound rates to Chicago and to Peoria are the same on shipments from the Illinois-Iowa territory, but on shipments from the Northwest the inbound rate to Peoria is 2 cents less than to Chicago; and on shipments from other points the difference is less than 2 cents. It is evident that the outbound reshipping rates from Peoria, varying as they do with the point of origin of the grain, are designed to equalize the total rate from point of origin to final destination, whether Peoria or Chicago is taken as the place for utilizing transit privileges. Stated in general terms, where the rate to Peoria is less than that to Chicago, the rate from Peoria is correspondingly greater than that from Chicago. In no case is this excess of outbound rate from Peoria over that from Chicago more than 2 cents per 100 pounds; and in some cases there is no excess. It is this excess, if any exists, of the rate from Peoria over the 30.5 cent rate from Chicago that constitutes the share being paid to the Alton by the connecting lines out of the joint rate from Peoria to New York. The connecting carriers invariably retain 30.5 cents as their own share, leaving the Alton a maximum of 2 cents per 100 pounds as its allotment. In some instances—specifically, on shipments of grain whose origin was in the Northwest—the Alton receives nothing, although it may have hauled the grain over its line from Peoria 155 miles.

The District Court, three judges sitting, did not consider the merits of the controversy. It dismissed the bill on the ground that the part of the order complained of was negative in character; and that hence the court was without jurisdiction. The case is here on direct appeal. Whether the order is a negative one within the meaning of the rule, compare *Proctor & Gamble Co.* v. *United States,* 225 U. S. 282; *United States* v. *Los Angeles & Salt Lake R. R. Co.,* 273 U. S. 299, is the main question requiring decision. The Alton concedes that courts have ordinarily no power to review a finding of the Commission that a particular division is not unreasonable or inequitable. The Alton's contention is that while the joint rates are in force it is obliged to accept traffic under them; that until the Commission decides otherwise it is entitled to the divisions agreed upon when the joint rates were established; that the order of the Commission in approving the reduced allowance to the Alton made by the connecting carriers in effect established new divisions; and that since these are obviously confiscatory, the order is void.

First. The order while negative in form was, in effect, an affirmative one. The joint "reshipping" rates and the divisions thereof were established by agreement of the carriers participating in the transportation. The divisions were a term of that agreement. So long as the joint rates voluntarily established remain in force, each carrier is entitled as of right to the division originally agreed upon, unless a readjustment of the divisions has been made either by the parties or by the Commission pursuant to the power conferred by paragraph 6 of § 15. The connecting carriers were legally without power to reduce the divisions of the Alton over its objection. If they deemed its divisions unreasonably large, they could have invoked the power of the Commission to make a reduction. Instead of applying to the Commission to adjust the existing divisions they resorted to force. Availing themselves of their strategic position as collectors of the freight, they withheld from the Alton a part of what was due it.

The Alton might have sued at law for the part of the divisions wrongfully withheld. *St. Louis S. W. Ry. Co.* v. *Bolinger & Co.,* 17 F. (2d) 924; compare *Malvern & F. V. R. R. Co.* v. *Chicago, R. I. & P. Ry. Co.,* 182 Fed. 685. But that was not its only remedy. Under § 15 (6) it was entitled to invoke the jurisdiction of the

Commission.[5] It could, obviously, have applied to the Commission to have the agreed divisions increased; and, likewise, it was entitled to apply to secure a determination that the agreed division shall be maintained. The Commission was not at liberty to decline to exercise its jurisdiction. Paragraph 6 imposed upon it the obligation to act upon the complaint. Compare *New England Divisions Case*, 261 U. S. 184; *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274. The Commission's finding that the Alton's divisions were "not unjust, unreasonable or otherwise unlawful," and the refusal of relief, had the effect of reducing the divisions which had been fixed by agreement of the parties and to which, but for the Commission's action, the Alton would have continued to be legally entitled.

Second. The jurisdiction of courts to review orders of the Commission is not dependent upon the form in which the order is couched. If the eastern carriers had applied to the Commission for a change in the divisions fixed by agreement, and the Commission had authorized divisions precisely like those which they are now imposing upon the Alton by their unauthorized action, the order would have been affirmative in form and would obviously have been subject to attack by the Alton in a suit in the federal court. By their unauthorized action the connecting carriers forced the Alton to become the moving party before the Commission, with

[5]In its complaint to the Commission, the Alton charged that the divisions allotted to it were unjust and unreasonable and in violation of the Interstate Commerce Act, as amended. The Commission has held that it has no authority to enforce agreements for divisions, apart from a showing of such violation of the Act. Laona & Northern R. R. Co. v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 52 I. C. C. 7; compare Morgantown & Wheeling Ry. Co. *v.* Pennsylvania R. R. Co., 63 I. C. C. 197. Section 208 (b) of Transportation Act, 1920, provides: "All divisions of joint rates, fares, or charges, which on February 29, 1920, are in effect between the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by material agreement between the interested carriers or by State or Federal authorities, respectively." The purpose of this provision, as stated by Chairman Esch of the House Committee on Interstate and Foreign Commerce, was to prevent rates and divisions from reverting, *ipso facto*, upon termination of federal control, to their pre-control status. See H. R. No. 456, 66th Cong., 1st Sess., p. 12; 58 Cong. Rec., p. 8314. The Commission has held that this provision did not confer authority upon it to enforce agreements for divisions. Hampton & Branchville R. R. Co. *v.* Atlantic Coast Line R. R. Co., 88 I. C. C. 77, 84.

the result that the Commission's approval of the divisions effected by them was expressed in the form of a refusal to interfere. This result of the alignment of parties does not endow the Commission's order with immunity from judicial review.

An order of the Commission which denies relief in part, or which dismisses the complaint, may be reviewed by a court. *Intermountain Rate Cases,* 234 U. S. 476, 490; *United States* v. *New River Co.,* 265 U. S. 533, 539-541. To annul the order would not, as in *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412, merely leave unchanged the very situation which the Commission's order refused to alter. Here the Alton, by virtue of the preëxisting agreement for divisions, would secure a measure of protection simply from the annulment of the order. To take jurisdiction would not be tantamount to usurpation by the court of the functions of the Commission. The court is not called upon here, as it was in *Manufacturers' Ry. Co.* v. *United States,* 246 U. S. 457, 483, and *Standard Oil Co.* v. *United States,* 283 U. S. 235, 241, to afford relief which the Commission, in the exercise of its powers, had found that the complainant was not entitled to receive.[6] The

[6]Compare also Procter & Gamble Co. *v.* United States, 225 U. S. 282, in which the petition in the Commerce Court included a prayer that the defendant railroads be enjoined from collecting demurrage charges on the complainant's tank cars while on its own tracks—the relief which the Commission had refused to grant.

After the decision in the Procter & Gamble case, eleven cases pending in the Commerce Court were dismissed by it for want of jurisdiction. In five of these the Commission had refused to award reparation; in three it had refused to order the establishment of through routes and joint rates; in one it had refused both an award of reparation and the establishment of through routes and joint rates; in one it had dismissed a complaint challenging the lawfulness of rates; and in one it had dismissed a complaint attacking an advanced rate as unreasonable. See Twenty-sixth Ann. Rep. I. C. C., pp. 34, 202-205.

The Commission thus understood the import of the Procter & Gamble decision: "Its [this Court's] conclusion was that upon the plain reading of that statute the jurisdiction of the court was confined to restraining the operation of the orders of the Commission and that it possessed no affirmative authority to enforce the administrative provisions of that act. . . . The central thought to be gathered from this exposition of the law seems to be that the administrative judgment of the Commission, as expressed by its orders, can not be reviewed by the courts, in so far as they are within its delegated authority, not confiscatory, and not palpably arbitrary and unreasonable." *Id.,* pp. 24, 27.

court is not asked to prescribe reasonable divisions, or to direct that they be prescribed by the Commission.[7] The court is asked to find that the Commission denied the Alton a constitutional right as a result of acting upon erroneous principles of law, and therefore to enjoin that part of the order.

The determination of the questions presented is properly within the scope of judicial review of the Commission's orders. The questions are not the correctness of its conclusion as to the reasonableness of the divisions, or the correctness of its findings as to any of the factors which the Act directs it to consider in determining reasonableness. The question is the correctness of the legal principles adopted by the Commission as a basis for reaching a conclusion from its findings. The Commission reasoned that since the particular transportation services of the Alton here in question were not of importance to the public, and since the Alton was in substance an intermediate, not an originating carrier, it might be denied a compensatory share of the existing joint rates with the defendant carriers. Whether the "importance to the public of the transportation services of such carriers," as specified in the Act, means the importance of the particular services in question, and whether a carrier not participating in joint rates with inbound roads is an "intermediate line" within the meaning of the section dealing with divisions, are questions upon which a court may properly pass. So too is the more fundamental question whether, assuming the Commission was correct in its construction of the Act, it follows that a noncompensatory share of existing joint rates may be imposed. Upon these questions the Alton was entitled to invoke the judgment of the court. Compare *Southern Ry. Co.* v. *St. Louis Hay Co.*, 214 U. S. 297, 301; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 449.

Third. The defendants contend that what is sought to be enjoined is not an "order" within the meaning of the Urgent Deficiencies Act. That contention is unsound. The action of the Commission presents none of the characteristics which have led this Court in other cases to hold that there was want of jurisdiction.

[7]Compare Hooker *v.* Knapp, 225 U. S. 302, in which a mandatory injunction was asked requiring the Commission to annul its order and reopen the case. The bill was dismissed on the authority of Procter & Gamble Co. *v.* United States, 225 U. S. 282. Compare also, Interstate Commerce Commission *v.* Waste Merchants Association, 260 U. S. 32.

It is part of an order, compare *United States* v. *Atlanta, B. & C. R. R. Co.*, 282 U. S. 522, 527; and the order is final, not tentative. Compare *Delaware & Hudson Co.* v. *United States*, 266 U. S. 438, 448. It was entered as the result of a formal controversy, not a project of the Commission, compare *United States* v. *Los Angeles & Salt Lake R. R. Co.*, 273 U. S. 299; and it marked the disposition of the controversy, not a preliminary stage. Compare *United States* v. *Illinois Central R. R. Co.*, 244 U. S. 82.[8] The suit to enjoin the order is not premature. Compare *Piedmont & Northern Ry.* v. *United States*, 280 U. S. 469. It subjects the Alton to damage which is substantial, immediate and irreparable. If the order is allowed to stand, and the eastern carriers continue to retain their present share of the joint rates, the Alton's only redress will be a subsequent complaint before the Commission. Even if the Commission should then decide that the existing divisions are unreasonable, it might be powerless to award reparation for the period from the entry of the present order. *Brimstone R. R. Co.* v. *United States*, 276 U. S. 104, 121.

The decree of the District Court dismissing the bill for want of jurisdiction is reversed, and the cause remanded to it for further proceedings.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[8]Compare also, New York, O. & W. Ry. Co. *v.* United States, 14 F. (2d) 850, affirmed *per curiam* 273 U. S. 652.